Supreme Court, U.S.
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No. 98-1570

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

JOHN SEFICK,
Petitioner,

v.

RICHARD GARDNER, in his Individual and Official Capacity, DONALD R. ZBYLUT, in his Individual and Official Capacity and ROBERT F. DUFFER, in his Individual and Official Capacity,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. May the Seventh Circuit usurp the Cooperative Use Act and the First Amendment to itself determine that a satirical sculpture of a federal judge may not be displayed in the lobby of the Dirksen Building/Courthouse because it would be inconsistent with its views of proper decorum, where the following factors are present:

   a. The Cooperative Use Act permits lobbies of federal buildings to be used for art and cultural activities;

   b. The Dirksen Building/Courthouse had been previously used and was being used at the relevant times for such things as art displays, blood donor facilities and a "computer expo";

   c. The Defendants in the case (essentially the GSA) itself, did not deny Plaintiff's permit to display the exhibit because it would be inconsistent with the judiciary's view of proper decorum in the lobby; and

   d. Nowhere in the record did the Defendant ever deny the Petitioner a permit to display his sculpture because it was inconsistent with a purported proper decorum.

2. May the Seventh Circuit go outside the record to affirm the denial of Petitioner's application to display a satirical sculpture of a judge in the Dirksen Building/Courthouse, where the record was otherwise insufficient to affirm the District Court.

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OPINIONS BELOW

The opinion of the U.S. Court of Appeals is reported at 1998, Lexis No. 32502. A copy of the opinion is included in the appendix at Appendix A at 1a-8a. The opinion of the District Court for the Northern District of Illinois is published at 990 F. Supp.587 (N.D. IL 1998) and is included as Appendix B at 9a-36a. The District Court ordered entry of the final judgement on February 12, 1998, which is printed in Appendix B at 9a.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit issued its opinion on December 28, 1998. This petition for Writ of Certiorari is filed within 90 days of the decision. The Court's jurisdiction is evoked pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides in relevant part:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The remaining statutory provisions, cited below are set forth in full, respectively, as Appendix C and Appendix D.

The Public Buildings Cooperative Use Act:

40 U.S.C. §490 (a) 17;

40 U.S.C. §601 (a)

40 U.S.C. §612 (a)

The Federal Property Management Regulations:

41 C.F.R. §§ 101-20. 400 to 101-20. 409

STATEMENT OF THE CASE

Plaintiff's action is brought pursuant to the First Amendment and the Public Buildings Cooperative Use Act. He contends that he was wrongfully denied a permit to display a satirical sculpture of the Honorable Brian Barnett Duff in the lobby of the Dirksen Building. Judge Duff is a federal judge. The Dirksen Building houses, among other things, the Federal Court in the Northern District of Chicago. This building had been open to various displays and exhibits pursuant to the Public Buildings Cooperative Use Act, 40 U.S.C. §§ 490, 601a, 606, 611 and 612a. The Plaintiff only sought injunctive relief; he sought a court order granting him the right to display his exhibit in the lobby of the Dirksen Building.

On January 20, 1998, a bench trial was held. The District Court issued a ruling on February 12, 1998, finding in favor of the Defendants. In the lower court trial, the Plaintiff conceded that the lobby of the Dirksen Building was not a public forum. The trial centered on whether the decision by the Defendants to deny Plaintiff a permit to display his exhibit was "reasonable" in view of the previous and ongoing uses of the lobby, since that was the relevant standard. See *Cornelius v. NAACP* 473 U.S. 788 (1985).

The opinion of the District Court is attached to Appendix B at 9a-36a. The District Court made certain findings of fact and conclusions of law in reaching its decision.

In his appeal to the Seventh Circuit, the Plaintiff made two contentions. First, he contended that the factual findings were without any factual support ("clearly erroneous"). Secondly, the Plaintiff contended that even if there was no

clear error in the factual findings, the Court was incorrect as a matter of law in finding the Defendants' denial of Plaintiff's permit application to be reasonable.

At best, the Defendants' evidence was weak--as noted in several places by the lower court. (Appendix B at 27a, 33a.) Thus, on appeal the Seventh Circuit did not discuss the factual basis for its affirmation of the lower court. In fact, no review of the factual record is actually indicated or done. The Appellate Court violated the mandate of the Cooperative Use Act and the First Amendment by determining for *itself,* that it has not opened *its* space in *its* building "to art about the judiciary." (As noted by the Appellate Court, this was contrary to this Supreme Court, which has opened its space to art about the judiciary.) (Appendix A at 7-8a.)

The latter determination by the Appellate Court is contrary to the requirements of the Cooperative Use Act since the Dirksen Building was unquestionably subject to the Cooperative Use Act, and the First Amendment. In short, the Appellate Court does not nor did it have the authority to determine what is appropriate art for the lobby. Further, it did not have the authority or right to set a standard for displays in the lobby, which it did in its opinion, which is inconsistent with the Cooperative Use Act and the First Amendment. A brief recitation of the facts mostly taken from the findings of the District Court illustrates the problems with the Appellate Court's decision. The full findings are attached at Appendix B.

The Plaintiff, John Sefick, is a retired federal probation officer/artist who has worked with various judges, including the object of the sculpture at issue, Judge Duff. He typically creates satirical sculptures of prominent people who are in the public eye. Sefick prefers that these objects be

placed where they have the maximum impact.

Sefick is well known in the Chicago area for his work. He has placed many sculptures in many public buildings, as noted by both the lower and Appellate Courts. This includes a sculpture of Telly Savalas in the federal Metcalfe Building, as well as a sculpture of then Mayor Bilandic in the Daley Center. (A dispute about this was ironically resolved in the Plaintiff's favor by a Federal Judge. See *Sefick v. Chicago* 485 F.Supp. 644 (N.D. Ill. 1979). The Daley Center is the *State Courthouse*.) Plaintiff also did a previous sculpture of Judge Duff that was displayed in the Dirksen Building. (Appendix A at 1-2a; Appendix B at 11a.)

Sefick applied to display his sculpture of Judge Duff under the guidelines of the Cooperative Use Act (as was the Plaintiff's practice). The Cooperative Use Act authorizes the administrator of the GSA to make, among other things, federal building lobbies available to cultural or educational activities. See *Claudio v. United States* 836 F.Supp. 1219, 1221 (E.D. N.C. 1993). Regulations have been promulgated setting forth the procedural mechanism under which this takes place. Further, the Code of Federal Regulations sets forth 6 criteria under which a proposed use will be denied. 41 CFR section 101-20.403. The statutes also indicate that the GSA should *encourage* the use of federal buildings for various activities. 40 U.S.C. section 601a(a)(2). Under the Cooperative Use Act, federal buildings have been used extensively for a wide variety of things. See, Petitioner's excerpt of Appellate Brief, attached as Appendix E.

Sefick's first application to display his sculpture was denied. This was done by letter and based upon two reasons. First, there was extensive construction going on in the lobby, and secondly, it was felt that an accompanying audio message

could be construed to influence judicial proceedings. An appeal of the denial was denied for the same reasons. (Appendix B at 12-13a.)

Sefick then submitted a second application. This application noted that he had changed the audio portion to the song "Don't Cry for Me Argentina." In writing, this too was denied. This time, construction and security concerns were cited. (*Id.*, at 16-19a.) (The influence of proceedings rationale was not mentioned.)

In fact, as the District Court noted, there was extensive construction activity occurring. There was testimony that indicated that security concerns stemmed from the Oklahoma City bombing. However, the influence of proceedings rationale was bogus, and essentially the District Court recognized that by stating that "[t]hese points [regarding influencing judicial proceedings] are largely semantic ones..." (Appendix B at 28a.)

Notwithstanding that there were construction and security concerns, the evidence strongly indicated that those concerns were pretextual as applied to Sefick's application. In fact, as noted by the lower court, the GSA was permitting a wealth of other activities to go on within the lobby of the Dirksen Building during this same period of time. These activities were at least as intrusive, if not more intrusive than Sefick's sculpture, from the perspective of construction and security concerns. These activities included, among other things, a 3 day computer expo *expected to involve 300 hundred people,* a blood drive (in which the lobby would be transformed into a virtual hospital ward, by drawing blood) expected to involve 100 people, and a week long children's art fair. (Appendix B at 20-21a.)

Significantly, no evidence was submitted by the GSA defendants, and the lower court made no findings in connection with Plaintiff's exhibit impacting negatively on the use of the lobby for, as the Appellate Court would have it, sedate and decorous exhibits only. This was clear from what had been permitted in the past in the lobby. (See Appendix A at 6-7a (Appellate opinion)). The lobby had never been limited to sedate and decorous exhibits. In fact, it was *emphatically not* the defendants' defense to submit that they rejected Sefick's application because of the impact that the sculpture would have on the sedate and decorous atmosphere in the lobby. The defendants trial strategy, to avoid being labeled as having discriminated against a viewpoint (see *Cornelius v. NAACP, supra)* was to indicate that they "did not know what message the piece was meant to offer," and to not "know what comment on the judiciary it might have made." (Appendix B at 20a.) This is despite the fact that they knew that the sculpture was an "embarrassment to Judge Duff." (Appendix B at 17a.)

In its decision, the District Court[1] noted in several places, without being specific as to its reasons, that the defendants' case was weak. Examples are as follows: (1) "Sefick might be able to poke some holes in the logic of Defendants' construction rationale." (Appendix B at 27a.)

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1 It should also be noted that for an unexplained reason, this case was re-assigned to an out of district judge to hear the case. Plaintiff has no complaints about the way the court conducted the trial or treated the parties. However, it was clearly speculated among the parties that there was no way that an out of district judge was going to tell the Northern District what it must place in its lobby -- especially in view of the fact that evidence showed that the Chief Judge in the Northern District was opposed to the sculpture. See, Appendix B at 17-18a.

(2) "Zbylut [one of the GSA officials who denied Plaintiff's permits] appeared motivated more by bureaucratic politics than his own personal concern with security." (*Id.*, at 28a.) (3) "The Court is mindful that some testimony indicated that the courts housed in the Dirksen Building were opposed to Sefick's sculpture because it would be an embarrassment to Judge Duff." (Appendix B at 32a.) (4) "On an overall note, perhaps one weakness in Defendant's case is that they have not articulated with all conceivable detail exactly what it was about Sefick's sculpture that was incompatible with construction, security concerns, and the need to avoid influencing court proceedings." (Appendix B at 33a.) All the foregoing is particularly bothersome, since the Defendants had the burden of proof to show that their actions were reasonable. (Appendix B at 23a-25a.)

Moreover, with the benefit of a transcript and time to thoughtfully articulate the weaknesses in the Defendants' position, their failings were highlighted to a higher degree in the Appellant's/Petitioner's opening brief. For example, the Defendants testified that because of construction they preferred exhibits sponsored by GSA tenants and of short duration. (Appendix B at 27a.) However, the evidence indicated that this latter "policy" was unwritten, uncommunicated to anyone [it was voiced by Richard Gardner, the GSA property manager], which was significant since Gardner's subordinates were making decisions on applications to permit things in the lobby, and it was a policy that was contradicted -- in writing. This was in a letter from Gardner to Chief Judge Aspen, in which Gardner stated that the GSA intended to follow the Cooperative Use Act guidelines in dealing with applications. See Excerpts of Appellant Brief (Appendix E). Thus, it was disturbing, and wrong, when the Appellate Court wrote an opinion that wholly avoided the factual issues which so dominantly had

been the engine which drove this case from the beginning.

As can be seen, the Appellate opinion first discusses Sefick's background. It then goes over the procedural history of the case. The opinion then discusses a mootness issue. Thereafter, in only a passing reference to the facts of this matter, the Appellate opinion made reference to the facts. Its reference was wholly limited to noting that it would be "hard" for Sefick to make a demonstration that construction and security concerns were not the reason for the denial. (Appendix A at 5a.) The following two plus pages of the opinion are then devoted to dealing with the question of "what's wrong with insisting that exhibits in a federal courthouse be dignified?" (Appendix A at 6a.)

What's wrong with the question is two-fold. First, that was not a position that was ever taken by the Defendants, and is therefore, nowhere to be found in the record. The Cooperative Use Act and its requirements and bases for disapproval governed this case and the actions of the Defendants – none of the 6 proscriptions for exhibits, or the Defendants, discussed the dignity of a Courthouse. 41 CFR section 101-20.403(a). (Appendix E at 45a.) Cf. *Cohen v. California* 403 U.S. 15 (1971). Secondly, the First Amendment, in this context, even in a nonpublic forum requires that decisions be made reasonably, in view of the accepted uses of a property. The placement of the sculpture was consistent with the ongoing and past uses of the property and the Appellate Court never analyzed that issue.

ARGUMENT

I.

THE APPELLATE COURT MUST CONSIDER ONLY WHAT IS IN THE RECORD OR RAISED BY THE PARTIES IN MAKING ITS DECISION

It is axiomatic that the Appellate Court, indeed, all courts are to only consider things that are in the record, or at the very least can only consider something that is raised in a party's brief. Rule 52(a) of the Federal Rules of Civil Procedure, which governed the review in this matter provides in pertinent part that:

> Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

This Rule was further clarified in First Amendment cases in *Bose Corp. V. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984). The latter case held and required that where the First Amendment is at issue the Appellate Court reviewing the case is to make an "independent review of the whole record." *Id.*, at 499. This is so that any judgement is sure not to "constitute a forbidden intrusion on the field of free expression." *Id.*

Surely, just as a finding cannot be set aside unless clearly erroneous in view of an independent review of the whole record, a finding cannot be *created* by the Appellate Court as was done here. The Appellate Court here implicitly found that Sefick's exhibit was comic, caustic and acerbic, (Appendix A at 6a). Further, on that basis, the Appellate

Court found that the sculpture was not permissible in the lobby of the Dirksen Building, which is to be limited to the "somber," which implicitly was a second "finding." (Appendix A at 7a.) Both of these "findings" were not contained in the record. As a result, the Appellate Court acted contrary to Rule 52(a). It gave no deference to the lower court's rulings (even if those rulings *were* favorable to the Defendants), it did no review of the record, and it usurped its own authority in overriding Congress which had spoken on the issue of what can and cannot be displayed in federal buildings. See 40 U.S.C. sections 490(a)(17), 601a, 612a, and 41 C.F.R. sections 101-20.400 et. seq. The latter statutes not only provide for the use of the lobbies of federal buildings for various things, but also, these statutes *encourage* such use.

Moreover, for the Appellate Court to have created its own reason for affirming the District Court violates due process and the Federal Rules of Appellate Procedure. Rule 28(a)(6) provides that the argument section of a brief "must contain the contentions of the appellant on the issues presented, and the reasons therefor..." The same applies to the appellees. Rule 28(b). None of the parties, clearly, briefed anything in connection with the purported sedate and decorous requirements of the Dirksen Building lobby. This is because there was no testimony to this effect. The Seventh Circuit itself holds that in the absence of any factual or legal development of any argument, it is waived. *Gagan v. American Cablevision, Inc.*, 77 F.3d. 951, 965 (7th Cir. 1996). The effect was the Plaintiff/Appellant had no opportunity to respond to the Seventh Circuit's contentions, and thus, was not given due process.

In this instance, the Seventh Circuit clearly has a self-interest in the decision of this matter which manifests itself in its opinion. However, its interest is contrary to the law. As

noted above, Congress has set up a system of opening up federal building lobbies and a system for determining what is placed in them. This system, of course, is bounded by First Amendment concerns. Thus, under the Appellate Court's ruling, a person who wore a t-shirt imprinted with a satirical picture of a particular judge could not go into the lobby of the Dirksen Building. That surely would be contrary to law. See *Cohen supra.*

In addition to the foregoing, having created a standard of what is permissible in the lobby, "the sedate and decorous," the Appellate Court is now in a position where they have to enforce this standard. However, it has already been held that taste and morality standards are too vague to be enforced. *Shuttlesworth v. City of Birmingham* 394 U.S. 147, 150-151 (1969). Further, as already noted this would impermissibly override Congress which has spoken on this issue.

Finally, the law governing what is permissible in a nonpublic forum is clear. As was noted in *Cornelius supra,*

> Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral. . . . Although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum, . . .or if he is not a member of the class of speakers for whose especial benefit the forum was created, . . . the government violates the First Amendment when it denies access to a speaker solely to suppress the point

> of view he espouses on an otherwise includible subject.

Id., at 806. (Citations omitted.)

No analysis of this standard set forth against the facts was done by the Appellate Court. And, in fact, if one had been done, it must be found that it was not reasonable to preclude Sefick from displaying his sculpture.

Additionally, the final comment by the Appellate Court, in which *Cornelius* is quoted, is to observe that the First Amendment is not violated by forbidding a speaker who would disrupt the intended use of a forum. This is out of context and incorrect. (See Appendix A at 8a.) In fact, that final sentence, which is the quote from *Cornelius*, omits to note that just preceding the quoted passage, the Supreme Court in *Cornelius* observed that

> The *record* adequately supported petitioner's position that respondents' continued participation in the Campaign would be detrimental to the campaign and disruptive of the federal workplace.

Id., at 810-811. (Emphasis added.) Unlike *Cornelius,* here, there was no record that indicated any disruption to the workplace resulting from Sefick's exhibit in the same fashion as that indicated in the above-quoted passage. If the Appellate Court were to have done an analysis of the record, as required by Rule 52(a), then it would have discovered that Sefick's sculpture would certainly have been less disruptive of the lobby than a 300 person computer expo, a blood drive, or an entire children's art exhibit.

II.

CONCLUSION

The courts and the courthouse are symbolic of many things. As the Appellate Court notes there should be no implication that the judiciary does not take their oaths seriously. However, the question that arises is whether those oaths are being taken seriously when a decision is made that appears to be self-serving, because the decision in this case was certainly not based upon the record. Is it more important to try and maintain a certain decorum in the lobby of a federal building, or to "stretch the law to cover for bureaucratic incompetence" as one commentator described on the internet? See "Sculpting a warped view of the First Amendment" located at Http://www.freedomforum.org/speech/commentary/doug/1998/7/2sculpturecol.asp.

The law should not be permitted to serve those in power because they have the power. A better statement of the courts would be to permit the sculpture and highlight that this is being permitted, not because it necessarily portrays an accurate sentiment, but because the First Amendment and thus, the Courts require it.

Date: March 29, 1999

Respectfully submitted,

/s/_____
Edward M. Fox

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

[Filed December 28, 1998]

No. 98-1632

JOHN SEFICK,	)
Plaintiff,	)
	)
v.	)
	)
RICHARD GARDNER, et al.,	)
Defendant.	)

OPINION

JUDGES: Before Easterbrook, Diane P. Wood, and Evans, Circuit Judges.

OPINION BY: EASTERBROOK

John Sefick creates satirical sculptures that he seeks to place in the lobbies of buildings connected to the events or persons being lampooned. Sefick's works combine public figures with audio tapes that deliver the point. For example, in 1979 Sefick mounted in the Richard J. Daley Civic Center a tableau of Michael Bilandic, who had recently been defeated for re-election as mayor (in part because of adverse public

reaction to the City's handling of snow removal in the winter of 1978-79), relaxing in an easy chair, with his wife Heather perched on the chair's arm. A tape recording continuously played this statement in a parody of Bilandic's voice:

> Heather, Heather, I think it is still snowing out there, Heather. I think it is still snowing. God, it must be around eight feet now, isn't it, Heather? At least eight feet. Maybe another log on the fire, Heather. Maybe another log on the fire. On the fire, another log on the fire, Heather. It is beginning to snow again. Another log on the fire, Heather. I think it is beginning to snow once again. My God, it must be eight feet out there now, Heather. I don't know what to do.
>
> What do you think we should do, Heather?

Sefick v. Chicago, 485 F. Supp. 644, 647 (N.D. Ill. 1979).

Sefick has placed sculptures in state and federal buildings throughout Chicago. But in 1996 the General Services Administration refused to permit Sefick to exhibit a sculpture in the lobby of the Everett McKinley Dirksen Federal Courthouse, the headquarters of the United States Court of Appeals for the Seventh Circuit and the United States District Court for the Northern District of Illinois, precipitating this litigation.

Sefick proposed to display a life-sized rendering of District Judge Duff astride a larger-than-life white horse. Horse and rider would be familiar to readers of political

cartoons. Both are distorted; the horse, for example, has an elongated neck, eyes cast upward with exaggerated whites, legs without visible joints, and squared-off shoulders, haunches, and chest. Judge Duff appears to be smiling and is holding the reins. The piece is eight feet tall and occupies approximately 35 square feet of floor space. A foot pedal activates a tape recording. Sefick described the sculpture, the accompanying tape, and its meaning in an attachment to his application:

> The Journey of Judge Brian Barnett Duff
>
> The Judge arrives at the Dirksen Federal Building atop a giant symbolic steed representing the United States Court system. The horse pauses. The Judge speaks, "As for the life of me I can't figure out why they're overturning all my rulings upstairs. Must be a lack of understanding. If they got their facts straight, they'd see it my way. Even if I didn't know better I think they trying to usurp my powers. That could be it. Oh great horse!" The horse overburdened, staggers under the tremendous weight of all its duties and responsibilities. Peer review, nonpeer review, pinpoint judicial review and just general criticism.

The GSA turned down Sefick's request under the Public Buildings Cooperative Use Act, 40 U.S.C. § 490(a)(17), citing ongoing construction in the building's lobby as the principal reason and a concern that the exhibit "may be construed as an attempt to influence judicial proceedings" as

a secondary reason. Sefick was offered and accepted the option of displaying the sculpture in the nearby Metcalfe Federal Building, where it appeared for two weeks. After Judge Duff retired from active service, Sefick revised his work to replace the tape with a recording of "Don't Cry For Me, Argentina" from Evita and asked again to display it in the Dirksen Courthouse. Once again the GSA said no, relying on continuing construction activity and security concerns that had led it to deny all applications for the time being. Sefick then commenced this litigation, contending that the GSA's refusal to permit the sculpture's display in the courthouse was viewpoint discrimination. After a bench trial, a judge from outside the Northern District of Illinois concluded that the GSA's stated reasons were honest and that no viewpoint discrimination had occurred. 990 F. Supp. 587 (N.D. Ill. 1998).

At oral argument we inquired whether the case is moot. Sefick did not ask for damages but sought to have his sculpture displayed without regard to its message. One month before the trial, the GSA decided that for security and aesthetic reasons it will not authorize displays of any kind in the lobby of the Dirksen Courthouse. Today the nature and message of a sculpture is irrelevant; none will be displayed. The district judge did not mention this change in policy or inquire whether it moots the dispute, and the parties' appellate briefs likewise ignored the question whether there is an ongoing case or controversy. After reviewing the post-argument briefs filed at our request, we conclude that the case is live, for two reasons. First, a court could order Sefick's sculpture displayed as a remedy for a violation of his first amendment rights in 1996 and 1997, even though in 1998 the GSA stopped considering applications for new displays. See

In re UNR Industries, Inc., 20 F.3d 766, 768 (7th Cir. 1994). Second, the current no-display policy, adopted after the commencement of this suit, is not implemented by statute or regulation and could be changed again, so this voluntary cessation of the challenged conduct does not eliminate the controversy. See United States v. Concentrated Phosphate Export Ass'n, Inc., 393 U.S. 199, 203, 21 L. Ed. 2d 344, 89 S. Ct. 361 (1968); Chicago Teachers Union v. Hudson, 475 U.S. 292, 305 n.14, 89 L. Ed. 2d 232, 106 S. Ct. 1066 0986). Cf. Los Angeles v. Lyons, 461 U.S. 95, 100-01, 75 L. Ed. 2d 675, 103 S. Ct. 1660 (1983); Parks v. Pavkovic, 753 F.2d 1397, 1403-04 (7th Cir. 1985).

Sefick can prevail on the merits of his appeal only by establishing that the district judge, as trier of fact, was clearly erroneous in concluding that the GSA did not discriminate against his sculpture because it was critical of the judiciary. Given the extensive construction in the lobby at the time of his applications, and the security concerns that in the wake of the Oklahoma City bombing have led many federal buildings to restrict pedestrian traffic (and exhibits that might attract it), that demonstration is hard to make. All four walls of the lobby in the Dirksen Courthouse are glass, so anything unusual inside will attract attention and thus traffic, which makes life more difficult for those charged with maintaining security. Moreover, Sefick displayed another sculpture of Judge Duffin 1995, * before the Dirksen Building was renamed the Dirksen Courthouse to reflect its transformation from a mixed-use to a judiciary building. If the GSA is set against sculpture critical of federal judges, why did it permit the display in 1995?

But even if Sefick could persuade us that in 1996-97

the GSA held the work's satirical perspective against him, that would just raise the question: what's wrong with insisting that exhibits in a federal courthouse be dignified? The lobby of the courthouse is not a traditional public forum or a designated public forum, not a place open to the public for the presentation of views. No one can hold a political rally in the lobby of a federal courthouse. It is a "nonpublic forum," which government "may reserve ... for its intended purposes". Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983). When deciding what may be displayed in a nonpublic forum, the government may exercise considerable selectivity, see Arkansas Educational Television Commission v. Forbes, 140 L. Ed. 2d 875, 118 S. Ct. 1633 (1998); Cornelius v. NAACP Legal Defense & Educational Fund, Inc., 473 U.S. 788, 87 L. Ed. 2d 567, 105 S. Ct. 3439 (1985); Piarowski v. Illinois Community College, 759 F.2d 625 (7th Cir. 1985), provided it does not transgress basic anti-discrimination rules. Thus it may forbid all political rallies, but it may not forbid one party's rallies while allowing another's. See Forbes, 118 S. Ct. at 1643; Chicago Acorn v. Metropolitan Pier & Exposition Authority, 150 F.3d 695 (7th Cir. 1998).

Nothing in the first amendment prevents the government from allowing sedate and decorous exhibits -- the lobby of the Dirksen Courthouse contains the Great Seal of the United States, copies of the Constitution and Declaration of Independence, a memorial to a deputy marshal killed in the line of duty, and a bust of Senator Dirksen -- while excluding the comic, the caustic, and the acerbic. Courts seek to induce in the jurors, witnesses, and litigants who pass through the lobby on the way to the courtrooms a serious cast of mind. An implication in the lobby that judges do not take their oaths

seriously, deal honestly with the facts, or respect the allocation of authority within the judiciary could undermine the seriousness with which other participants take their own oaths and tasks. The judiciary does not show reruns of the Three Stooges in courthouse lobbies, and from the perspective of promoting the judicial mission a sculpture satirizing judges would be worse than old physical comedies. No one doubts that displays in courtrooms and adjacent corridors may be limited to the icons of government, such as seals and flags, and that judges may insist that all those present behave in a dignified manner. Why should this be less true of the lobby? Newspapers and the streets outside are open to scathing criticism of what happens within the courthouse. See United States v. Grace, 461 U.S. 171, 75 L. Ed. 2d 736, 103 S. Ct. 1702 (1983). But the halls of justice may be kept hushed. A preference for the somber over the sardonic within a courthouse is not viewpoint or even subject-matter discrimination. It is a standard time, place, and manner limitation. A courthouse is not the place for this manner of expression. Daumier's caricatures of lawyers, judges, and witnesses belong in a museum (or a political magazine, where they originally appeared), not in the lobby of the Dirksen Courthouse.

The lower level of the Supreme Court building contains art and exhibits. Descending a grand marble staircase, the visitor encounters an imposing statue of John Marshall, sitting as if enthroned. Corridors are lined with portraits of former Justices, dioramas illustrating famous cases, and material from the Court's history. We asked Sefick's lawyer at oral argument whether the Constitution entitles his client to install in this gallery a clangorous, plaster-of-Paris work satirizing the current Chief Justice

(perhaps with a patter song from Trial by Jury substituted for the theme of Evita). Counsel was unwilling to claim that the first amendment prevents the Supreme Court from limiting its display to hagiography. Yet a demand to install a sculpture on the Supreme Court's ground floor would be much stronger than a demand to put a sculpture in the Dirksen Courthouse's lobby, for the Supreme Court has opened its space to art about the judiciary, while the Seventh Circuit has not. The Supreme Court favors the Supreme Court Historical Society (a private group) over artists such as Sefick; no similar favoritism is ongoing (or occurred in 1996-97) in the Dirksen Courthouse. Portraits of judges line the corridors and main courtrooms of the Dirksen Courthouse, but an artist's claim to have his own satirical portrait of a judge placed among these would be met with guffaws. Just so with a demand for display space in the courthouse lobby. "The First Amendment does not forbid a viewpointneutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose." Cornelius, 473 U.S. at 811.

Footnotes

* The 1995 sculpture depicts Judge Duff "tongue lashing" an unseen person, following which the model Cindy Crawford enters, the judge speaks rapidly to her, and Crawford stands her ground with a look of "Who is this guy?". Sefick later added TV commentator Walter Jacobson to the tableau to increase its humor quotient. See Janan Hanna, Bill Crawford & John O'Brien, Pair Supermodel, Good-Hearted Judge; Will Sparks Fly?, Chicago Tribune (Feb. 14, 1995); Hanna, Crawford & O'Brien, Barings Demise Not Likely to Slow Pace of the Pacific Rim, Chicago Tribune (Mar. 14, 1995).

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF ILLINOIS, EASTERN DIVISION

[Filed February 12, 1998]

No. 97 C 1539

JOHN SEFICK, Plaintiff,	)
v.	)
RICHARD GARDNER, et al., Defendant.	)

ORDER

COUNSEL: For Plaintiff: Edward M. Fox, Shefler & Berger, Ltd., Chicago, IL.

For Defendant: Matthew D. Tanner and Thomas P. Walsh, Assistant U.S. Attorneys, Chicago, IL.

JUDGES: RUDY LOZANO, JUDGE,
United States District Court.

OPINION BY: RUDY LOZANO

This matter is before the Court upon conclusion of a bench trial. For the reasons set forth below, the Clerk is ORDERED TO ENTER JUDGMENT forthwith for Defendants and against Plaintiff, denying Plaintiff injunctive relief and all other relief, and dismissing this case with prejudice.

BACKGROUND

Plaintiff, John Sefick, has created a sculpture of the Honorable Brian Barnett Duff of the Northern District of Illinois. Sefick would like to use the lobby of the Dirksen Federal Building in Chicago to display the piece. The Dirksen Building contains federal courts, including the courts of the Northern District of Illinois. Sefick is suing three present or former administrators of the General Services Administration ("GSA") in their official capacities, alleging that they violated his First Amendment rights by denying him permission to display his work. The case was assigned by designation to the undersigned, a judge of the Northern District of Indiana, Hammond Division.

Defendants assert that they were entitled to reject Sefick's sculpture because the Dirksen Building lobby is a nonpublic forum and their decision was reasonable and not viewpoint discrimination. In addressing Defendants' summary judgment motion, the Court ruled that the lobby is a nonpublic forum. However, the issues of reasonableness and viewpoint discrimination were left for trial.

The parties agreed to a bench trial. At the request of the parties, the trial was held in Chicago at the Dirksen Building.

Sefick seeks only an injunction allowing him to display his sculpture; he does not seek damages. No one has contested that Sefick's sculpture constitutes expression that is generally protected under the First Amendment.

FINDINGS OF FACT

Sefick is a retired federal probation officer who worked with the judges of the Northern District of Illinois, including Judge Duff. He is also an artist who creates sculptures that he intends to be satirical and that feature prominent people who are currently in the public eye. Sefick prefers to place his sculptures in environments where they will have maximum impact, and he has placed sculptures in federal buildings before. Sefick applied to have these past sculptures and his current sculpture displayed under the federal Public Buildings Cooperative Use Act ("Act").

Past examples of work Sefick has placed in federal buildings include a piece depicting the actor Telly Savalas as a "Toxic Avenger." With GSA's permission, Sefick placed this piece in the Metcalf Federal Building, which houses EPA offices. Also with GSA's permission, in February 1995, Sefick placed a previous sculpture of Judge Duff in the Dirksen Building lobby. That piece depicted the judge on the bench "tongue lashing" someone. Then, a mannequin representing the model Cindy Crawford entered the room holding a briefcase and wearing a miniskirt. An audio tape portrayed Judge Duff as speaking rapidly. The mannequin of Crawford acted as if "standing her ground," with a look of, "Who is this guy?" (Ex. 3)

The sculpture involved in this case consists of a life-

sized rendering of Judge Duff sitting astride a white horse. The horse is not natural in appearance or proportion. It has an elongated neck, eyes looking upward with exaggerated whites, legs without visible joints, and squared-off shoulders, haunches, and chest. Judge Duff appears to be smiling and is holding the reins. The piece is eight feet tall and takes up floor space of about five feet by eight feet. It weighs about 400 pounds.

Sefick actually applied twice to display two different versions of this sculpture in the Dirksen Building lobby. As first proposed in August 1996, the sculpture incorporated a tape recording that identified the rider of the horse as Judge Duff and contained a voice representing Judge Duff's commenting on his rulings being overturned "upstairs." Sefick applied in writing to display the sculpture for two weeks. Sefick believes that whether the sculpture could have been viewed as commenting on the relationship between a district judge and the court of appeals was a matter of interpretation. At the time of his first application and the second one described below, Judge Duff was the subject of controversy and media attention. (The evidence at trial did not say more about what kind of controversy or attention.)

About two weeks after Sefick submitted this first application, Defendant, Richard Gardner, sent a letter to Sefick notifying him that the application was denied. At the time, Gardner was a GSA property manager whose duties included reviewing permit applications under the Act for the Dirksen Building. The denial letter offered the following reasons:

First, as you are aware, there is extensive

> construction activity occurring in the building's lobby area. I do not want to cause the construction workers or the pedestrians in the lobby any more unwarranted obstructions than are necessary. All Applications are being critically reviewed due to the above. Title 5, C.F.R. Section 101-20.403(a)(3) serves as the basis for this denial.
>
> The second basis for denial of your Application/Permit is contained in Title 5, C.F.R. Section 101-20.403(a)(4). I am concerned that your art exhibit, which includes an accompanying recorded message of Judge Duff may be construed as an attempt to influence judicial proceedings in either the U.S. District Court or the U.S. Court of Appeals for the Seventh Circuit.

(Ex. 4)

At the time of this letter, significant construction activity was indeed occurring in the Dirksen Building lobby. New glass was being installed, a two-year project that disrupted the entire lobby. Panes of glass twelve feet tall were being moved around the lobby. At different times, different areas of the lobby would be the focus of the construction. The workers in the lobby numbered ten to fifteen. Also, safety shields were placed by the elevators to direct persons to magnetometers.

Gardner believed that placing Sefick's display amidst the construction activity would endanger the safety of

construction workers and pedestrians in the lobby, or inconvenience the workers and pedestrians, or both. The "critical review" the denial referenced meant that Gardner paid special attention to how long a display would last, and whether the sponsor of the display was a tenant or nontenant of GSA. Gardner believed that tenant displays were less problematic because it was easier to get a tenant to move or reschedule a display on short notice if needed to accommodate the construction.

Regarding influence of judicial proceedings, Gardner's beliefs were less concrete. When he first reviewed Sefick's application, he had a vague sense that the sculpture might cause problems in some proceeding because Judge Duff had been the subject of controversial media attention. So, Gardner referred the application to legal counsel. Counsel actually wrote the denial letter. Gardner reviewed the letter, found it agreeable, and signed it. However, Gardner himself did not think through the "influence" rationale in any detail.

Gardner did not know what message the sculpture was intended to convey. Specifically, he did not know if the sculpture was positive or negative toward Judge Duff, or positive or negative toward the court of appeals.

Besides the reasons in the letter he signed, Gardner also thought the sculpture might present a security risk in light of the April 1995 bombing of the Murrah Federal Building in Oklahoma City. However, he did not have a firm sense of just how the sculpture would threaten security.

Within days, Sefick appealed Gardner's decision to Defendant, Robert Duffer, another GSA property manager.

In his appeal letter, Sefick stated that he believed he could work with Gardner to find a suitable place in the lobby where the sculpture would not interfere with pedestrian traffic or the construction workers' activities. Sefick also stated that he did not understand how the sculpture could be viewed as an attempt to influence judicial proceedings. Sefick added as follows: "The A.C.L.U. has had contact with Paul Maxse, Esq., Office of Regional Counsel, General Services Administration on my behalf concerning first amendment rights pertaining to these lobbies. I hope this denial does not mark a turn around on what I believe has been an understanding." (Ex.5)

Several days later, Duffer affirmed Gardner's denial by letter. Duffer stated that he had carefully reviewed Gardner's reasons and agreed with them. Duffer also offered to allow Sefick display space in the nearby Metcalf Building, which does not contain court facilities. (Ex.6)

Regarding construction, Duffer was aware of the activity in the Dirksen Building lobby. Regarding influence of proceedings, Duffer knew what the sculpture depicted and what the tape would say. He did not wholly understand what message the sculpture was meant to convey. However, he did think the tape was derogatory toward a presiding judge because it suggested that the court of appeals was overturning all of Judge Duff's rulings. Duffer believed the derogatory content had a chance, albeit a remote chance, of influencing proceedings. He thought that a juror walking through the building might see the sculpture and not know who sponsored it. He thought the sculpture thus might influence the juror in a negative way, especially if the juror was serving in a case

presided over by Judge Duff.

Like Gardner, Duffer thought the sculpture might present a security risk, although he did not say so in his letter. He thought courthouses were a major security concern. He also thought that all federal buildings had heightened security concerns after the Oklahoma City bombing. He was concerned that Sefick's sculpture might create a security threat by bringing increased public traffic to the Dirksen Building. Duffer thought the piece would be less of a security threat in the nearby Metcalf Building because it does not house courts, does not attract a lot of public traffic, and has good security. Duffer also knew that previously in the Dirksen Building, a hostage situation had occurred and a prisoner had been shot. Actually, security was Duffer's largest concern with respect to Sefick's sculpture.

About a month after Duffer's affirmance, Sefick wrote to Gardner offering to change the sculpture to overcome concerns expressed regarding potential influence of proceedings. Sefick stated:

> 1 have thought of a way to overcome our differences with the Judge Duff Sculpture. Since Judge Duff has resigned I would change the recording to play "Don't Cry for me Argentina" the theme song of Evita. I think even the powers that be would have to "reach" to see how this Sculpture with that music would influence "judicial proceedings". You know 1 kind of liked Judge Duff because he never conformed so 1 think these changes will make the whole thing very benign and

> acceptable. The Sculpture will not even mention his name.

(Ex. 7)

By these changes, Sefick intended to lend a resignation theme to the piece. However, Sefick did not expressly identify this theme in his letter, nor does the evidence show that he identified it in any other way to any Defendant or GSA official.

Gardner did not respond to this letter, but another GSA official sent Sefick a letter offering him display space in the Metcalf Building. Sefick was reluctant to use that space because the Metcalf Building does not contain court facilities and thus was not the type of display environment he wanted. Nonetheless, Sefick placed his sculpture in the Metcalf Building for the full two weeks he had originally requested. He placed a sign on the piece that said, "See Art Censored by GSA"; he had not mentioned any such sign in his application. At one point, building workers moved the sculpture after giving Sefick only one day to do so. Also, while in the Metcalf Building the sculpture was damaged; the Court cannot determine from the evidence who damaged it.

In the meantime, Defendant, Donald Zbylut, had taken over Gardner's position and the responsibility for reviewing applications under the Act. Gardner and Zbylut had spoken about Sefick's sculpture. Gardner told Zbylut that he thought Sefick would keep trying to gain permission to display the piece. According to Zbylut, Gardner "probably" told him that the courts were opposed to the sculpture because it was an embarrassment to Judge Duff. Zbylut believed that Chief

Judge Marvin Aspen of the Northern District of Illinois was concerned about displays that could impede judicial proceedings.

In January 1997, Zbylut replied in writing to a letter from Sefick's then-current attorney. Zbylut told the attorney that Sefick's previous application had expired and requested a new application. Sefick submitted the requested application several days later; this application proposed the second version of the sculpture, the one with the tape of the "Evita" song and which did not refer to Judge Duff. Sefick asked to display the sculpture in the Dirksen Building lobby during February 17-March 8, 1997.

Zbylut consulted with legal counsel, and about two weeks later, he denied the application in a letter to Sefick. Legal counsel wrote the letter and Zbylut signed it. Specifically, the letter stated that Zbylut approved the application, but only for the Metcalf Building. (Sefick ultimately decided not to place his piece in the Metcalf Building a second time.) The letter gave the following reasons for not allowing Sefick to use the Dirksen Building lobby:

> The Dirksen Federal Building lobby is currently undergoing extensive construction activity along the entire first floor lobby area. Several weeks ago there was a significant work accident associated with the construction. I do not want to cause the construction workers and the lobby users any further unwarranted disruptions during this period. In addition, you should be aware that the entire Dirksen facility is presently undergoing a security evaluation

> as a result of threats that have been made to certain of the building's tenants. This matter is considered extremely serious. We are evaluating the future use of the lobby for displays and other activities in light of security and other tenant concerns. I am not approving any Applications for use of space in the building until these concerns are fully addressed. GSA has advised a federal employee association and a local university who have made Applications of the above position. Both of the above activities have been accommodated in alternate space.

(Ex. 11)

At the time of this letter, there was significant construction activity in the lobby. Also, GSA officials were evaluating Chief Judge Aspen's request to ban all lobby displays as a security measure. What any final policy on displays might be was a subject of discussion, but no firm and wholly agreed policy had been set. Zbylut was aware that the discussions were happening, but others higher up in GSA would have been final decisionmakers on what policies GSA would endorse. The discussion on the security concerns raised by lobby displays had nothing to do with the subject or viewpoint of any display. Zbylut decided to go along with what the letter said about not approving any displays until the higher-ups decided what they were going to do.

Unlike Gardner's denial, Zbylut's letter did not mention influence of proceedings as a reason for denying Sefick's application. Zbylut did not consider the subject

matter or viewpoint of the sculpture in rejecting it. Zbylut knew that Sefick's sculpture depicted a rider on a horse in a judge's robe and was accompanied by a tape playing "Don't Cry For Me Argentina." He knew the sculpture did not identify Judge Duff by name. Zbylut did not know what message the piece was meant to offer. He did not know what comment on the judiciary it might have made. In Zbylut's mind, the sculpture offered no clue as to what it was supposed to mean.

GSA did allow some activities in the Dirksen Building lobby during and around the time that Sefick was seeking to place his sculpture there. On May 17, 1996, a one-day health fair sponsored by a GSA tenant was approved by one of Gardner's assistants to be held on October 9, 1996. On September 6, 1996, a six-hour display by the U.S.D.A. graduate school, a GSA tenant, was approved by one of Gardner's assistants to be held on October 22, 1996. The display involved setting up two tables in the lobby. On November 5, 1996, a three-day computer expo sponsored by a GSA tenant was approved by Zbylut to be held November 5-7, 1996. The expo was expected to involve three hundred people. On August 12, 1996, a one-day blood drive sponsored by a GSA tenant was approved by one of Gardner's assistants to be held on January 27, 1997. The drive was expected to involve one hundred people. On February 3, 1997, a five-day children's art exhibit sponsored by a GSA tenant was approved by one of Zbylut's assistants to be held February 24-28, 1997. The exhibit was expected to involve one hundred people. On December 18, 1996, a one-hour press conference sponsored by a group with no connection to GSA was approved by one of Zbylut's assistants to be held on December 19, 1996. Finally, on March 26, 1997, a

photographer not connected to GSA was approved by one of Zbylut's assistants to take photos on March 27, 1997, for no more than one hour.

Because of the construction, Gardner would not have approved the activities the assistants approved, except maybe the one-hour press conference. Gardner's assistants had some authority to approve the activities they did, but a lack of communication between Gardner and the assistants sometimes resulted in the assistants taking actions Gardner would not have approved. Likewise, Zbylut expected his assistants to consult with him before permitting activities in the lobby, the assistants did not always do so, and Zbylut would not have approved the children's art exhibit. The reason why Zbylut approved the relatively large computer expo but not Sefick's sculpture was because the expo was sponsored by a GSA tenant. As for Duffer, he thought that tenants are not even subject to the Act, and use Act-oriented application forms only for the internal purpose of reserving space.

Finally, no Defendant rejected Sefick's sculpture because he disapproved of its viewpoint, or because any other person who disagreed with the viewpoint pressured the Defendant to reject the sculpture.

CONCLUSIONS OF LAW

The precise nature of Sefick's right to use the lobby turns in large part on what type of forum the lobby is. Three types are possible. First is the traditional public forum, "property that has traditionally been open to the public for expressive activity, such as public streets and parks." United States v. Kokinda, 497 U.S. 720, 726, 111 L. Ed. 2d 571,

110 S. Ct. 3115 (1990) (plurality opinion). The second forum type is the "limited or designated public forum," which is "created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for discussion of certain subjects." Johnson v. City of Fort Wayne, 91 F.3d 922, 941 (7th Cir. 1996) (quoting Cornelius v. NAACP Legal Defense & Educ. Fund, Inc., 473 U.S. 788, 802, 87 L. Ed. 2d 567, 105 S. Ct. 3439 (1985)). The third forum type is the nonpublic forum, an area that government "may reserve... for its intended purposes," and "to which the government may control or limit access." Johnson, 91 F.3d at 922 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46, 74 L. Ed. 2d 794, 103 S. Ct. 948 (1983)).

In deciding Defendants' summary judgment motion, the Court ruled that the Dirksen Building lobby is a nonpublic forum. Therefore, Defendants may keep "identifiable subjects or speakers" out of the lobby if doing so is reasonable and "viewpoint neutral." Johnson, 91 F.3d at 941.

An official's "decision to restrict access to a nonpublic forum need only be reasonable; it need not be the most reasonable or the only reasonable limitation." Cornelius, 473 U.S. at 808. Reasonableness does not require the government to establish that the subject of speech is strictly incompatible with the forum. Id. In sum, reasonableness allows government "exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose." Cornelius, 473 U.S. at 811. Reasonableness "must be assessed in light of the purpose of the forum and all the surrounding circumstances." Id. at 809.

Even having "reasonable grounds for limiting access to a nonpublic forum... will not save" a refusal of access "that is in reality a facade for viewpoint-based discrimination." Id. at 811. Although viewpoint-discrimination is impermissible, subject discrimination is permitted. So, Defendants may restrict speech in the Dirksen Building lobby, based on the subject of the speech -- they may choose to allow speech on some subjects, but not on others. However, Defendants may not pick and choose among viewpoints within a subject. See Grossbaum v. Indianapolis-Marion Cty. Bldg., 100 F.3d 1287, 1297 (7th Cir. 1996), cert. denied, 137 L. Ed. 2d 1030, 117 S. Ct. 1822 (1997); Johnson, 91 F.3d at 941. For example, GSA might properly ban courthouse speech on the subject of abortion, but it could not ban speech advocating one viewpoint on the abortion debate while allowing speech on another. The often crucial "line between viewpoints and subjects is ... an elusive one." Grossbaum, 100 F.3d at 1298.

Upon the Court's request, before trial the parties briefed who bears the burden of proof on reasonableness and viewpoint. At trial, the Court delivered a brief oral ruling placing the burden on Defendants. The Court now states in more detail the reasons for that ruling.

The parties' efforts and the Court's have not turned up any precise and binding authority. Still, what authority exists points in the direction of placing the burden on Defendants. In Cornelius, the Supreme Court encountered a nonpublic forum and accordingly addressed whether government restrictions on speech were reasonable. In so doing, the Court's perspective seemed to be one of testing whether the government had shown that its restriction was reasonable, not whether the party seeking access to the forum had shown the

opposite. See Cornelius, 473 U.S. at 806-11. The Court specifically noted that the "record supported" the government's "position" and "inference[s]" favorable to the government. Id. at 810. Speaking more specifically, one district court has concluded that the government bears the burden of proof on viewpoint neutrality, although that court relied on authority offering only tangential support. We the People, Inc. of the U.S. v. Nuclear Regulatory Comm'n, 746 F. Supp. 213, 219 (D.C. 1990). In cases involving traditional and designated public forums, the government clearly bears the burden of "showing that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end" Perry, 460 U.S. at 45. Granted, in a nonpublic forum the government's reasons for restricting speech are not subject to such strict scrutiny. Still, it makes sense to give the government the burden of showing the validity of its justifications in a nonpublic forum case -- precious First Amendment rights are at stake, and we generally presume that the government cannot infringe on such rights without affirmatively demonstrating an adequate reason. n1

Only one case has been identified that lends support for placing the burden on Sefick. In passing, the Seventh Circuit has perhaps suggested that the plaintiff bears the burden on viewpoint discrimination. In affirming a grant of summary judgment, the Johnson court noted that the plaintiff had "simply failed to introduce any evidence" to allow an inference that his access to a nonpublic forum had been limited solely to suppress his viewpoint. 91 F.3d at 942. Of course, this remark warrants careful consideration. However, this Court views the remark as a general comment on a weak case, not a directive to place the reasonableness and viewpoint

burdens on plaintiffs in all cases. In sum, in light of what authority exists, the Court must conclude that Defendants bear the burden of showing that their decision to reject Sefick's sculpture was reasonable and not meant "to suppress the point of view" the sculpture "espouses on an otherwise includable subject." Cornelius, 473 U.S. at 806.

As alluded to above, Sefick's applications were processed under federal statutory and regulatory provisions. Under the Public Buildings Cooperative Use Act, 40 U.S.C. §§ 490, 60la, 606, 61 I, 612a ("the Act"), the administrator of GSA is authorized to "make available, on occasion .... auditoriums, meeting rooms, courtyards, rooftops, and lobbies of public buildings to persons, firms, or organizations engaged in cultural, educational, or recreational activities ... that will not disrupt the operation of the building." 40 U.S.C. § 490(a) (17); Claudio v. United States, 836 F. Supp. 1219, 1221 (E.D.N.C. 1993), aff'd, 28 F.3d 1208 (4th Cir. 1994). "Cultural activities" includes "film, dramatic, dance, and musical presentations, and fine art exhibits." 40 U.S.C. § 601 a(a)(4).

The administrator has promulgated regulations that allow persons desiring to use public property to apply for a permit to do so. 41 C.F.R. § 101-20.401(a). The applicant must submit a written application identifying himself or herself and any organization sponsoring the proposed activity, and describing the proposed activity, including the desired dates and times. Id. § 101-20.401(b); Claudio, 836 F. Supp. at 122 I. If an application is denied, the applicant may appeal within GSA. 41 C.F.R. § 101-20.404(a); Claudio, 836 F. Supp. at 1221.

An application will be denied if "the proposed use interferes with access to the public area, disrupts official government business, interferes with approved uses of the property by tenants or by the public, or damages any property; [or] ... is intended to influence or impede any pending judicial proceeding." 41 C.F.R. § 101-20.403(a)(3)&(4); Claudio, 836 F. Supp. at 1221. Defendants cite this provision as supporting their decision to deny Sefick's applications to display his sculpture in the Dirksen Building lobby.

Specifically, Defendants assert that they denied the applications for three reasons, none of which had anything to do with suppressing the viewpoint expressed in the sculpture. First, Defendants state that Sefick's display would have interfered with ongoing construction and made the lobby unsafe. Second, Defendants cite security concerns that have arisen in all federal buildings in the wake of the Oklahoma City bombing. Third, Defendants were concerned that the sculpture as first proposed (with the taped voice representing Judge Duffs) could be viewed as "intended to influence or impede ... pending judicial proceeding[s]." 41 C.F.R. § 20.403(a)(4).

Sefick argues that these reasons do not hold water and are pretexts for viewpoint discrimination. He alleges that Defendants rejected his sculpture because of the viewpoint it offers, a viewpoint Defendants thought would be embarrassing to Judge Duff.

More specifically, Sefick attempts to show that the construction concern was a pretext by stressing that other activities were allowed in the lobby during the time that he

sought access. Yet the evidence showed that Defendants had legitimate and reasonable explanations for allowing those activities but not Sefick's sculpture. While the lobby was under construction, Defendants preferred activities sponsored by GSA tenants of short duration, so that disruption would be minimized and activities could be relocated or rescheduled easily if needed. Generally, the activities approved fit this bill. None lasted more than five days; some lasted only part of one day. The two activities not sponsored by a GSA tenant each lasted an hour. In contrast to the allowed activities, Sefick, who was not affiliated with GSA, proposed a 400-pound sculpture to be displayed for two weeks. Any perceived inconsistencies between the Defendants' stated preference for short, tenant-sponsored activities and the activities actually approved were satisfactorily explained as departures from the chain of command between Gardner, Zbylut, and their assistants, or based on the particular nature of the activity approved.

The Court recognizes that Sefick might be able to poke some holes in the logic of Defendants' construction rationale. Perhaps Defendants did not always act consistently. Perhaps the activities Defendants did allow presented something of a safety risk and inconvenience themselves. Perhaps if Defendants had bent over backwards, they could have found a safe and convenient way to accommodate Sefick's piece. But the First Amendment does not require that officials who run nonpublic forums be consistent managers, safety experts, or unfailingly accommodating. See Cornelius, 473 U.S. at 808 (noting that officials may deny expression even if it is not strictly incompatible with a forum). Rather, all the officials must do is act reasonably, and not to suppress a viewpoint.

Sefick also asserts that the security concern was not legitimate, a pretext. However, substantial unrebutted testimony indicated that at all relevant times, security was a serious concern in all federal buildings and especially those housing court facilities. Moreover, Duffer genuinely believed that Sefick's display could present a security risk by increasing public traffic in the Dirksen Building.

Sefick has attacked Zbylut's citing security as insincere. Zbylut agreed with the point in the letter he signed that the best thing to do while higher-ups were formulating a security policy on lobby displays was to not approve any displays. Granted, in doing so, Zbylut appeared motivated more by bureaucratic politics than his own personal concern with security. Still, his action was reasonable in light of the security debate going on above him and not motivated by a desire to suppress the viewpoint of Sefick's piece. Indeed, the general debate about banning lobby displays for security reasons had nothing to do with the viewpoint or subject of any display. The Court is mindful that after Zbylut's letter stating that he had decided not to approve any use of lobby space, two other activities were approved. But Zbylut's assistants approved them, not Zbylut.

Sefick also attacks Defendants' influence-of-proceedings rationale. He maintains that calling the sculpture capable of "influencing... pending judicial proceeding[s]" is a stretch. 41 C.F.R. § 20.403(a)(4). He also stresses that Defendants have not identified any specific, then-ongoing proceeding that the sculpture might have influenced. These points are largely semantic ones regarding whether Defendants' decision fits under the precise terms of the regulation. Yet Sefick has not sued for violation of the

regulation, but for violation of the First Amendment. Whether the regulatory language required Defendants to pinpoint a specific ongoing proceeding as capable of being influenced by Sefick's sculpture is a question of what the regulation requires, not what the First Amendment requires.

Of course, Sefick suggests that if Defendants applied the regulation's terms expansively, that shows they were using the regulation to hide a censorship agenda. Yet regardless of how well Sefick's sculpture fits under the regulatory concept of potential "influence," it fits sufficiently under a concept more relevant for present purposes.

To dispense fair and effective justice, decorum must be maintained in a courthouse. Indeed, "it is proper to weigh the need to maintain the dignity and purpose of a public building" when considering a citizen's right to use the building for expression. Kokinda, 497 U.S. at 738 (Kennedy, J., concurring) (citing United States v. Grace, 461 U.S. 171,182, 75 L. Ed. 2d 736, 103 S. Ct. 1702 (1983)).

For the benefit of all citizens, cases must be heard in a dignified environment that impresses upon the participants the seriousness and importance of proceedings, and the need to follow the rules of deliberation, decision, and personal behavior that the trial judge supplies. This vital interest in courthouse decorum is most emphatically not a mere interest in shielding judges from criticism and personal discomfort. Rather, ensuring decorum ensures that the persons whose property and liberty are at stake in legal proceedings have their rights adjudicated fully, fairly, and according to the rule of law.

Duffer's concern that a juror might be negatively influenced by Sefick's sculpture was essentially concern over courthouse decorum. A juror who, in the courthouse, encounters an arguably cartoonish sculpture of a sitting judge commenting that all of his rulings are being overturned might conclude that the courthouse is something less than the sober and weighty place it must be, or that Judge Duff and his colleagues do not warrant the respect that their positions -- not their personal feelings -- require. Duffer reasonably and genuinely saw Sefick's sculpture as capable of negatively influencing jury deliberations. Others might differ as to whether the piece presented such a threat, but that does not make Duffer unreasonable.

With all this in mind, the influence-of-proceedings rationale withstands scrutiny. Sefick can perhaps criticize Defendants' reasoning with some success, but the reasoning is not unfounded or an obvious pretext for viewpoint discrimination.

Still, Sefick would no doubt argue that potential juror influence is a lot to read into a sculpture that the artist himself says had a viewpoint subject to interpretation. Indeed, the "meaning" of art is often uncertain, fluid, and subjective. Sefick may rightly claim that what his work says is a matter of interpretation, yet the more cryptic the viewpoint, the less likely it is that Defendants discriminated it. See Claudio, 836 F. Supp. at 1230. Defendants testified convincingly that they did not really appreciate the precise meaning or message of the sculpture in either of its incarnations. Defendants cannot readily discriminate against a viewpoint they cannot ascertain, one which the artist himself apparently intended to be elusive. Zbylut's denial of the second version of Sefick's sculpture

was consistent with these notions; the second version became more cryptic and did not explicitly refer to Judge Duff, and Zbylut did not give potential influence of proceedings as a reason for rejecting the piece.

Also, Sefick asserts that Defendants' rejection of the latest Judge Duff sculpture amounts to viewpoint discrimination because Defendants have permitted speech "on the same general subject matter in the past." (Proposed Findings and Conclusions, p. 8) Apparently, the past speech Sefick refers to is the sculpture depicting Judge Duff and Cindy Crawford. Sefick has produced no authority, and the Court is aware of none, that having once let in a sculpture of Judge Duff, GSA must let in another.

Still, what Sefick may be trying to say is that GSA is wrongfully picking and choosing among viewpoints that fall within the subject matter of displays that might influence proceedings. Yet the boundaries of viewpoint and subject matter are so fluid here, and the viewpoints so unclear, that the Court cannot brand GSA's different treatment of Sefick's Judge Duff sculptures viewpoint discrimination. Sefick did not testify as to what he intends his current sculpture to mean, except to say that whether the first version commented on the relationship between a district judge and the court of appeals was subject to interpretation. Of the two versions of the current sculpture, one explicitly identified Judge Duff but the other did not. According to Sefick, the sculpture of Cindy Crawford and Judge Duff was about "courtroom dynamics and control;" in Sefick's eyes "the control thing has a sexual element to it." (Ex. 3)

What are government property managers to make of

all this? The First Amendment does not require that officials who manage a nonpublic forum have the artist's sensibilities regarding the messages embodied in creative works, nor the trial judge's sensibilities regarding courthouse decorum. All officials must do is act reasonably in light of the needs and primary purpose of the forum, and not to suppress an ascertainable viewpoint. See Cornelius, 473 U.S. at 808-11. Contrary to what Sefick suggests, the Court does not accept that Defendants approved of the viewpoint of the previous Judge Duff sculpture, but disapproved of the viewpoint of the current one and chose between them accordingly. n2

The Court is mindful that some testimony indicated that the courts housed in the Dirksen Building were opposed to Sefick's sculpture because it would be an embarrassment to Judge Duff. However, this testimony lacked specificity and force; it was in the nature of second-and third-hand reports. Also, "embarrassment" can mean either personal embarrassment to Judge Duff -- likely not a valid concern for First Amendment purposes -- or objective embarrassment to the court system that might unduly threaten courthouse decorum -- a valid concern as covered above. The evidence was inconclusive regarding which type of embarrassment the courts were supposedly concerned about. However, the evidence was conclusive that no Defendant rejected Sefick's work for the purpose of saving a judge or judges from personal embarrassment.

To show pretext in general, Sefick has stressed that it was actually counsel who wrote Gardner's and Zbylut's denial letters. Taken in context, there is nothing terribly sinister or unusual about this. Sefick's correspondence and his trial testimony show that he had rattled the litigation saber before

in trying to place his work in the Dirksen Building, and was doing so again with respect to the current sculpture of Judge Duff. Of course, Sefick had every right to protect his perceived First Amendment rights with legal action, just as Defendants acted rightfully and prudently by seeking legal assistance in responding to Sefick's requests. Indeed, every word in the denial letters has been scrutinized in this case, just as Gardner and Zbylut might have suspected would happen when they sought the assistance of counsel.

On an overall note, perhaps one weakness in Defendant's case is that they have not articulated with all conceivable detail exactly what it was about Sefick's sculpture that was incompatible with construction, security concerns, and the need to avoid influencing court proceedings. The Court recognizes that Defendants' testimony could have said more to explain their thought processes. Yet Defendants' burden is simply to demonstrate that they acted reasonably and not to suppress a viewpoint. To meet that burden they need not deliver a dissertation from the witness stand -- nor the exacting detail of a judicial opinion.

Based on the evidence, the facts found herein, and the relevant law, the Court concludes that Defendants' acted reasonably and not out of viewpoint discrimination. Thus, Defendants did not violate the First Amendment and Sefick is not entitled to relief.

At trial, Sefick objected to certain testimony by James Whitlock of GSA (not a defendant here) as irrelevant and not within the scope of the pretrial order. Under Sefick's standing objection, which the Court reserved ruling on, Whitlock testified that as of about a month before trial, GSA had

adopted a security policy of banning any use of the Dirksen Building lobby, by GSA tenants or nontenants, that was not necessary to the operation of the building. The Court need not rule on Sefick's objection, because the above ruling has been reached without considering the portion of Whitlock's testimony that Sefick opposed. However, Sefick's post-trial brief perhaps indicates that he has changed his tune and now wants the Court to consider the testimony for the proposition that the new, total-ban policy is really a pretext that shows continuing efforts to suppress the viewpoint in Sefick's sculpture. Were the Court to consider the testimony for that purpose, it would reject Sefick's proposition and the ruling here would be the same.

CONCLUSION

For the foregoing reasons, the Clerk is ORDERED TO ENTER JUDGMENT forthwith in favor of Defendants and against Plaintiff, denying Plaintiff injunctive relief and all other relief, and DISMISSING this case with prejudice.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial before the Court. The issues have been tried and a decision has been rendered.

That judgment is entered in favor of defendants and against plaintiff, denying plaintiff injunctive relief and all other relief, and dismissing this case with prejudice.

Footnotes

n1 See R.A.V. v. City of St. Paul, 505 U.S. 377, 390 n.6, 120 L. Ed. 2d 305, 112 S. Ct. 2538 (1992) (noting that "presumptive invalidity" of content-based speech restrictions still "leave[s] room for such exceptions as reasonable and viewpoint-neutral content-based discrimination in nonpublic forums"); City of Watseka v. Pub. Action Council, 796 F.2d 1547 (7th Cir. 1986) ("The proponent of an ordinance that allegedly infringes upon ... First Amendment rights ... has the burden of establishing that the statute is constitutional"); Hays Cty. Guardian v. Supple, 969 F.2d 111, 118 (5th Cir. 1992) (stating that the government bears the burden of establishing reasonableness of a content-neutral regulation of speech in a public forum); TJ's South, Inc. v. Town of Lowell, 895 F. Supp. 1124, 1129 (N.D. Ind. 1995) (noting that prior restraints on speech "face a heavy presumption that they are unconstitutional"); cf. Thornburgh v. Abbott, 490 U.S. 401,414 n.12, 104 L. Ed. 2d 459, 109 S. Ct. 1874 (1989) (declining to address whether a district court had been correct in shifting the burden between plaintiffs and defendants in a case challenging prison officials' screening of publications received by inmates).

n2 The summary judgment ruling in this case noted a previous case involving Sefick as possibly working against Defendants. Sefick v. City of Chicago, 485 F. Supp. 644 (N.D. Ill. 1979). In that case, Sefick obtained an injunction allowing him to display a piece depicting Chicago's mayor. The district court found disingenuous the reasons city officials gave for why they allowed Sefick to display two other sculptures, but removed the one of the mayor. 485 F. Supp. at 650. Unlike that case, here, GSA's different treatment of

Sefick's different sculptures has a satisfactory basis. Accordingly, this Court has reached a different result. Likewise, the present case is distinguishable from Amato v. Wilentz, 753 F. Supp. 543 (D.N.J. 1990), vacated on other grounds, 952 F.2d 742 (3d Cir. 1991), which the Court also noted in the summary judgment ruling as potentially unfavorable to Defendants.

APPENDIX C

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX D

THE PUBLIC BUILDINGS COOPERATIVE USE ACT

40 U.S.C. § 490(a)(17), provides:

§490. Operation of buildings and related activities by Administrator

(a) General duties

Whenever and to the extent that the Administrator has been or hereafter may be authorized by any provision of law other than this subsection to maintain, operate, and protect any building, property, or grounds situated in or outside the District of Columbia, including the construction, repair, preservation, demolition, furnishing, and equipment thereof, he is authorized in the discharge of the duties so conferred upon him --

(17) to make available, on occasion, or to lease at such rates and on such other terms and conditions as the Administrator deems to be in the public interest, auditoriums, meeting rooms, courtyards, rooftops, and lobbies of public buildings to persons, firms, or organizations engaged in cultural, educational, or recreational activities (as defined in section 612a of this title) that will not disrupt the operation of the building;

The Public Buildings Cooperative Use Act

40 U.S.C. § 601a provides:

> § 601a. Duties of Administrator; Federal agency accommodations; historical and architectural preservation of public buildings; consultation with Governors, agencies, and chief executive officers
>
> (a) In order to carry out his duties under this title and under any other authority with respect to construction, operating, maintaining, altering, and otherwise managing or acquiring space necessary for the accommodation of Federal agencies and to accomplish the purposes of this title, the Administrator shall –
>
> (1) acquire and utilize space in suitable buildings of historic, architectural, or cultural significance, unless use of such space would not prove feasible and prudent compared with available alternatives;
>
> (2) encourage the location of commercial, cultural, educational, and recreational facilities and activities within public buildings;
>
> (3) provide and maintain space, facilities, and activities, to the extent practicable, which encourage public access to and stimulate public pedestrian traffic around, into, and through public buildings, permitting cooperative improvements to and uses of the area between the building and the street, so that such activities complement and supplement commercial, cultural, educational, and recreational resources in the

neighborhood of public buildings; and

(4) encourage the public use of public buildings for cultural, educational, and recreational activities.

(b) In carrying out his duties under subsection (a) of this section, the Administrator shall consult with Governors, areawide agencies established pursuant to title II of the Demonstration Cities and Metropolitan Development Act of 1966 [42 U.S.C. 3331 et seq.] and section 6506 of title 31, and chief executive officers of those units of general local government in each area served by an existing or proposed public building, and shall solicit the comments of such other community leaders and members of the general public as he deems appropriate.

(Pub. L. 94-541, title I, § 102, Oct. 18, 1976, 90 Stat. 2505.)

The Public Buildings Cooperative Use Act

40 U.S.C. § 612a provides:

§ 612a. Additional definitions

As used in this title and in the amendments made by this title –

(1) The term "Administrator" means the Administrator of General Services.

(2) The terms "public building" and "Federal agency" have the same meaning as is given them in this chapter.

(3) The term "unit of general local government" means any city, county, town, parish, village, or other general purpose political subdivision of a State.

(4) The term "historical, architectural, or cultural significance" includes, but is not limited to, buildings listed or eligible to be listed on the National Register established under section 470a of title 16.

(5) The term "commercial activities" includes, but is not limited to, the operations of restaurants, food stores, craft stores, dry goods stores, financial institutions, and display facilities.

(6) The term "cultural activities" includes, but is not limited to, film, dramatic, dance, and musical presentations, and fine art exhibits, whether or not such activities are intended to make a profit.

(7) The term "educational activities" includes, but is not limited to, the operations of libraries, schools, day care centers, laboratories, and lecture and demonstration facilities.

(8) The term "recreational activities" includes, but is not limited to, the operations of gymnasiums and related facilities.

(Pub. L. 94-541, title I, § 105, Oct. 18, 1976, 90 Stat. 2507.)

APPENDIX E

THE FEDERAL PROPERTY MANAGEMENT REGULATIONS, 41 C.F.R. §§ 101-20.400 TO 101-20.409

Subpart 101-20.4 – Occasional Use of Public Buildings

§ 101-20.400 Scope of subpart.

Sections 101-20.401 through 101-20.408 establish rules and regulations for the occasional use of public areas for cultural, educational and recreational activities as provided by the Public Buildings Cooperative Use Act of 1976 (Pub. L. 94-541).

§ 101-20.401 Applications for permits.

(a) Any person or organization desiring to use a public area shall file an application for permit with the GSA Buildings Manager. Such application shall be made on a form provided by GSA and shall be submitted in the manner specified by GSA.

(b) The following information is required:

(1) Full names, mailing addresses, and telephone numbers of the applicant, the organization sponsoring the proposed activity, and the individual(s) responsible for supervising the activity;

(2) Documentation showing that the applicant has authority to represent the sponsoring organization;

(3) A description of the proposed activity, including the dates and times during which it is to be conducted and the number of persons to be involved.

(c) If the proposed activity constitutes a use of a public area for soliciting funds, the applicant shall also submit a signed statement that:

(1) The applicant is a representative of and will be soliciting funds for the sole benefit of, a religion or religious group; or

(2) The applicant's organization has received an official ruling of tax-exempt status from the Internal Revenue Service under 26 U.S.C. 501; or, alternatively, that an application for such a ruling is still in process.

§ 101-20.402 Permits

(a) A permit shall be issued by GSA within 10 working days following its receipt of the completed applications. A permit shall not be issued for a period of time in excess of 30 calendar days, unless specifically approved by the regional officer. After the expiration of a permit, a new permit may be issued upon submission of a new application; in such a case, applicants may incorporate by reference all required information filed with the prior application.

(b) When more than one permit is requested for the same area and times, permits will be issued on a first-come, first-served basis.

(c) All permits involving demonstrations and

activities which may lead to civil disturbances should be coordinated with the Chief, Law Enforcement Branch, before approval.

§ 101-20.403 Disapproval of applications or cancellation of permits

(a) GSA shall disapprove any application or cancel an issued permit if:

(1) The applicant has failed to submit all information required under § 101-20.401, or has falsified such information;

(2) The proposed use is a commercial activity as defined in § 101-20.003(d);

(3) The proposed use interferes with access to the public area, disrupts official Government business, interferes with approved uses of the property by tenants or by the public, or damages any property;

(4) The proposed use is intended to influence or impede any pending judicial proceeding;

(5) The proposed use is obscene within the meaning of obscenity as defined in 18 U.S.C. 1465-65; or

(6) The proposed use is violative of the prohibition against political solicitations in 18 U.S.C. 607.

(b) Upon disapproving an application or cancelling a permit, GSA shall promptly notify the applicant or permittee

of the reasons for the action, and shall inform the applicant or permittee of his/her appeal rights under § 101-20.404.

[52 FR 11263, Apr. 8, 1987; 52 FR 24158, July 29, 1987]

§101-20.404 Appeals.

(a) A disapproval of application or cancellation of issued permits may be appealed to the GSA Regional Officer (as defined in § 101-20.003(m)) within 5 calendar days of the notification of disapproval or cancellation. Notices of appeal must be made in writing.

(b) On appeal, the applicants or permittee and the GSA buildings manager shall have opportunity to orally state their positions on the issues. Written materials may also be submitted.

(c) The GSA Regional Officer shall affirm or reverse the GSA building manager's decision, based on the information submitted, within 10 calendar days of the date on which the Regional Officer received notification of the appeal. If the decision is not rendered within 10 days, the application will be considered to be approved or the permit validly issued. The Regional Officer will promptly notify the applicant or permittee and the buildings manager of the decision and the reasons therefor.

[52 FR 11263, Apr. 8, 1987; 52 FR 24158, July 29, 1987]

§ 101-20.405 Schedules of Use.

Nothing in these regulations shall prevent GSA from

reserving certain time periods for use of public areas for official Government business; from setting aside certain time periods for maintenance, repair, and construction; or from permitting a previously approved use for official Government business.

§ 101-20.406 Hours of use.

Public areas may be used during or after regular working hours of Federal agencies, provided that such uses will not interfere with Government business. When public areas are used by permittees after normal working hours, all adjacent areas not approved for such use shall be locked, barricaded, or identified by signs, as appropriate, to restrict permittees' activities to approved areas.

§ 101-20.407 Services and costs.

(a) *Costs.* The space to be provided under these regulations is furnished free of charge. Services normally provided at the building in question, such as security, cleaning, heating, ventilation, and air-conditioning, shall also be provided free of charge by GSA. The applicant shall be requested to reimburse GSA for services over and above those normally provided. If the applicant desires to provide services, such as security and cleaning, this request must be approved by the GSA Regional Officer. GSA may provide the services free of charge if the cost is insignificant and if it is in the public's interest.

(b) *Alterations.* Permittees shall make no alterations to public areas except with prior approval of GSA. Such approval shall not be given unless GSA determines that

changes in a building should be made to encourage and aid in the proposed use. Permittees making alterations must make provisions to ensure the safety of users and the prevention of damage to property.

(c) Permittees are responsible for furnishing items such as tickets, audiovisual equipment, etc., which are necessary for the proposed use.

§ 101-20.408 Conduct.

(a) Permittees are subject to all rules and regulations governing conduct on Federal property as set forth in sub-part 101-20.3. In addition, a permittee shall:

(1) Not misrepresent his or her identity to the public;

(2) Not conduct any activities in a misleading or fraudulent manner;

(3) Not discriminate on the basis of race, creed, color, sex or national origin in conducting activities;

(4) Not distribute any item, nor post or otherwise affix any item, for which prior approval under § 101-20.401 has not been obtained;

(5) Not leave leaflets or other materials unattended on the property; and

(6) Not engage in activities which would interfere with the preferences afforded blind licenses under the

Randolph-Sheppard Act (20 U.S.C. 107).

(b) Permittees engaging in the solicitation of funds as authorized by § 101-20.401 shall display identification badges while on Federal property. Each badge shall indicate the permittee's name, address, telephone number, and organization.

§ 101-20.409 Non-affiliation with the Government.

The General Services Administration reserves the right to advise the public through signs or announcements of the presence of any permittees and of their nonaffiliation with the Federal Government.

APPENDIX F

STATEMENT OF FACTS

I. John Sefick and his sculpture

A. Sefick's Background

Plaintiff John Sefick ("Sefick") is a artist who does satirical art in installation form. He usually does sculptures of people who are the focus of some media attention. Along with the sculptures he installs audiotapes. Tr. at 10-11.

The environment in which the sculpture is placed is important to Sefick. He tries to engage the audience that comes through the buildings where the sculpture is located. He tries to present artwork that can interact with people. The purpose of the audio portion is to present something to interact with the audience. To listen to the audio portion, the viewer must press a pedal. Tr. at 11. This, of course, is optional. The audio portion will not play unless the pedal is pushed.

'Plaintiff's sculptures have a "shelf life." The reason for this is that Sefick works "or, the media a lot" which gives him ideas for his sculptures. The "shelf life" consists of the time in which the object of the sculpture is in the media focus. Thus, as it applies here, "Judge Duff was interacting with the newspapers and he was interacting in his court with controversial issues or controversy, and [Sefick] tried to do a little satire on that in terms of the sculpture." Tr. at 12.

Examples of art that Plaintiff has done in the past are prior sculptures of Judge Duff displayed at the Dirksen Building, Jane Byrne, President Clinton and Ronald Reagan (at the Kluczynski building), and Telly Savalas as the "toxic avenger" which the EPA found objectionable, at the Metcalf Building. Tr. at 12-14. Notably, Sefick also did a sculpture of Mayor Bilandic, satirizing the infamous snow removal operation of 1979, and sought to display it at the Daley Center. It was removed until Sefick obtained a court order, written by the Honorable Marvin Aspen, ordering the City of Chicago to display the sculpture. *Sefick v. City of Chicago,* 485 F. Supp. 644 (N.D. III. 1979).[1]

Sefick was an employee of the United States Probation and Parole office. He had worked in the courtroom of Judge Duff in the past. Tr. at 10.

B. The course of events

At issue in the that were two separate applications submitted by Plaintiff to display his exhibit. The first application was done in August of 1996. Tr. at 17. Exhibits 1 and 14 are pictures of the exhibit. The dimensions of the sculpture were approximately 8 feet high and 5 by 7 feet. Tr. at 18. The sculpture was accompanied by an audiotape, which referred to Judge Duff's decisions being overturned. Tr. at 3. There was no contention that Plaintiff did not follow proper

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[1] For a further explanation of Plaintiff's art form, see *Sefick* supra at fn. 4. In that trial, unlike this case an expert testified about "installation art."

application procedures.

In response to his first application, Plaintiff received a denial letter, identified as exhibit 4, from Richard Gardner, then the Dirksen Building Manager. Tr. at 18. As can be seen, the letter noted 2 reasons for the denial. They were extensive construction activity in the Dirksen Building lobby and possibly an attempt to "influence judicial proceedings." Ex. 4.

Shortly thereafter, Sefick appealed the decision by letter, dated September 16, 1996. Tr. at 20 and ex. 5. In this letter, Plaintiff offered to "work with Mr. Gardner" to avoid any problems with the construction. *Id* There was never a response to this offer.

In a letter dated just 3 days later, September 19, 1996, Robert Duffer, the Director, Property Management Division, denied the appeal, stating no new grounds in the denial. He also offered the Metcalf Federal Building as an alternative site. Tr. at 21, and ex. 6. Sefick did not accept the Metcalf Building because it was not the courthouse. Tr. at 21.

Before any further correspondence, Sefick spoke with Gardner regarding the denial. He indicated that since construction seemed to be the only real issue, he would wait until construction was over. In response to this Gardner indicated that no matter what the state of construction the sculpture with the tape "was not going to be displayed here,..." Tr. at 22. Gardner admitted to speaking to Plaintiff; he did not deny the latter statement. Tr. at 78.

Thereafter, on October 23, 1996. Sefick wrote another

letter to Gardner. He offered to change the tape and make "it like a resignation sculpture of a judge." Tr. at 23. This was because Sefick thought that Judge Duff was resigning or going on senior status. Thus, the tape was changed to "Don't Cry For Me, Argentina." *Id*; ex. 7. Also, significantly, Plaintiff noted in his letter that there was another exhibit then being displayed within the lobby, which covered more space than the sculpture. Ex. 7.

In response to this letter and another written by Sefick's attorney, Exhibit 8, Plaintiff received the letter, identified as exhibit 9. Tr. at 25; ex. 9. In this letter, Gardner's successor, Donald Zbylut ("Zbylut")(Gardner had been promoted), indicates that Plaintiff would have to submit a new application because his previous permit "has expired." Up to the point of the "expiration" of Sefick's first application, the sole reasons given for its denial were construction and possibly impeding judicial proceedings. *Nothing* was said, as was contended by defendants only at trial, about security concerns, policies closing off the lobby entirely, and/or policies limiting displays to GSA sponsored activities, or building tenants. As a result of the "expiration" of plaintiff's application, on January 13, 1997, Plaintiff submitted his second application. Tr. at 26; ex. 10.[2]

By letter dated January 30, 1997, Sefick received his

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[2] It should be noted that in December, 1996, Plaintiff did reluctantly take defendants up on their previous offer to use the MetCalf Building. Sefick described the experience at the MetCalf Building as the "art exhibit from hell." Tr. at 28. He was harassed and his sculpture was vandalized. Tr. at 28-29.

response from Zbylut. This letter denied Plaintiff's application, The reason of "impeding judicial proceedings" was dropped. Construction and "security" concerns were given as reasons. This was the first time that "security" issues were raised. Again, not indicated in the letter is a description of any policy limiting the lobby to federal tenants or GSA sponsored activities. Indeed, the letter indicates that a federal employee association was not approved because of security concerns. Tr. at 26-27, at ex. 11. (But, there were unavoidable reasons for that denial. See *infra*, IV.B.)

As is easily seen below, *all* the correspondence contradicted, either by omission or express misstatements of fact, the testimony of the authors of those letters in connection with the reasons for Plaintiff's denial.

II. Richard Gardner and his denials of plaintiff's application

From 1990 until October, 1996, Gardner was employed by the GSA as building manager for the loop field office, which included the Dirksen building. In October 1996, he was promoted to Director, Property Management Division. While the building manager, one of Gardner's duties was to grant permits for displays in the Dirksen building. Tr. at 39-40.

A. Gardner's actions in connection with plaintiffs application

Gardner received plaintiff's first application in August, 1996. He had dealt with previous applications by plaintiff, including the prior one of, Judge Duff, also displayed at the Dirksen Building. Tr. at 40.

Gardner testified that he did not know the intended viewpoint of the sculpture, or if it was intended to be critical. Tr. at 41. Notwithstanding this, because it was a sculpture of Judge Duff, he thought it might be controversial so he decided the legal department should look at it. He indicated this because "I saw headlines about Judge Duff this and Judge Duff that." Tr. at 71.

Gardner's letter denial, exhibit 4, which he signed, was not written by him. This was the first time that Gardner had signed a denial letter written by another. Tr. at 63. He was not sure who wrote it.

As noted above, the denial letter gave construction and a possible attempt to influence judicial proceedings as the reasons for the denial. The construction was a reglazing project of the windows in the Dirksen Building lobby. Construction workers were using partitions to direct the flow of traffic through the lobby. Tr. at 43-44. However, Gardner acknowledged at trial that he had testified at his deposition that he had never examined the lobby to see if it, in fact, would effect and/or impede construction activity. Tr. at 64.

With regard to the contention that Sefick's sculpture might influence judicial proceedings, Gardner indicated that he had read some things in the newspaper regarding Judge Duff. He testified that "there might be some judicial proceedings that could be influenced, unduly influenced." Tr. at 70. He testified no more specifically than that. Moreover, Gardner also acknowledged his deposition testimony, in which he indicated he was not told by anybody else who was involved in writing the denial letter, how or what particular judicial proceedings might be influenced by the sculpture. *Id*

B. The GSA and Gardner's practice, policy, and procedure in connection with exhibits.

Gardner indicated that since 1990, he would get one to two permits per month to put things in the Dirksen lobby or the plaza. During this time he recalled only two outright denials of permits. One was the revoking of permission to place a flag in the lobby that had been approved. That exhibit, however, had false facts placed in the application. The other denial was to nuns who wanted to collect donations outside the lobby. This was because it was commercial and because of religious concerns. Tr. at 61-62.

To justify his denial of Plaintiff's application, Gardner testified to "policies" never documented. The witness testified and implied by his testimony that he was not approving any exhibits during the time of construction. See Tr. at 46-50. However, he did not testify and there is no evidence to support that he denied any permits, other than Sefick's. The evidence by omission is that he simply received no other permits. Moreover, Gardner acknowledged that there were "probably four to five" exhibits approved in the lobby of the Federal courthouse since June of 1996, *during the time of the construction.* Tr. at 47.

Gardner acknowledges his assistants did approve displays. Tr. at 49. In fact, they approved all that were proposed. He justified this with two reasons, both of which are mutually exclusive. His first reason was that these exhibits were "agency-sponsored." Tr. at 48-50. *See also* Tr. at 53-54. Therefore, inferentially, it was okay. (It is noteworthy that the only permit applications received during the relevant time period were from GSA sponsored activities and tenants. Tr.

at 75.) However, contrary to this Gardner also testified that the applications were approved because of a lack of communication between he and his assistants. Tr. at 53. Nevertheless, and confusingly, he admitted that there was no written policy of not permitting any displays in the building at that time. Id. Adding to the confusion and contradiction, he admitted that although he personally would not have approved the exhibits that were approved, he never withdrew a permit, despite the ability to do so. Tr. at 76-77. Further, with regard to the fact that he had an unwritten and *uncommunicated,* tr. at 66-67, policy of only permitting applications from GSA tenants, he admitted that no superior ever said to him that he was supposed to limit applications to GSA tenants. Tr. at 75.

In addition to the foregoing, in another attempt to justify the denials, Gardner testified that security was a concern. This was not written until Zbylut's denial letter, which occurred in late January, 1997. Gardner noted that after the Oklahoma City bombing, there was a heightened concern with security issues. However, he cannot recall an application ever being denied because of security. To the day of his testimony, he is still not aware of any denials because of security. Tr. at 73. Gardner did not testify how security would be impacted by Sefick's sculpture.

There is more to Gardner's newly created "policies" than the fact that they were not documented in his letters to plaintiff, not dictated by his superiors, not communicated to his assistants, and simply internally inconsistent in their explanation. He did, in fact, document a policy *contemporaneously* with the relevant actions, in a letter to Judge Aspen. This was a letter written by Gardner, which *he had forgotten about* which expressly set forth the policies of

the GSA in connection with displays in the Dirksen Building as of January 27, 1997. Tr. at 68-69 and exhibit 12; see short appendix, 2. Importantly, Gardner expressly testified that this letter was "clarifying the GSA's position with regard to the lobby of the Federal Courthouse and the exhibits." Tr. at 69. Testimony on this point was as follows:

> Q. Ok, and, in any case, in this letter among other things, you were clarifying GSA's position on closing the lobby of the federal courthouse to exhibits of all kinds, correct?
>
> A. Yes, sir.
>
> Q. And the GSA's position was that they were considering that option, but they didn't expect to adopt that policy in the future is that right?
>
> A. Yes, sir.

Tr. at 69.

Importantly, the letter indicates in response to a request by Judge Aspen to close the lobby to displays of all kinds, that the GSA would refuse to do so. Gardner expressly indicated that it was the policy at that time for the GSA to keep the lobby open consistent with what was required under the Public Building's Cooperative Use Act Of 1976. The letter states, in part, as follows:

> It is the policy of GSA generally that lobbies of public buildings be available for use by *persons or other entities* engaged in cultural or education activities. Applicable regulations govern the permit process for such use. We will keep you informed of any decisions whether to change the GSA policy for the Dirksen

Courthouse lobby area.

(Emphasis added) Exhibit 12. Notably, there is nothing in that letter which indicates that the lobby is being closed off, or temporarily closed off because of construction, and/or because of security concerns. Moreover, Gardner admitted in his testimony that the Cooperative Use Act does not limit the use of public buildings to GSA tenants. Tr. at 75. The letter expressly states that the lobby will be available to "persons or other entities" without any limitations.

Thus, as a result of the foregoing, it is interesting to note the many other exhibits, displays and activities which went on in the Dirksen building lobby during the time period that defendants testified the lobby was going to be off limits to other's use. Other uses, which occurred in chronological order, are as follows:

(1) A Health Fair in the lobby on October 9, 1996, which was expected to draw all government employees in the loop;

(2) A graduate school USDA 75th Anniversary information booth with two tables to be set up in the lobby on October 22, 1996;

(3) A three day computer expo which was expected to engage approximately 300 persons to take place on November 5th through 7th, 1996;

(4) A press conference which took place on December 19, 1996;

(5) Several nurses who were to actually take blood from donor's in the lobby, from employees who wished to donate on January 21, 1997;

(6) A children's art exhibit which was to take place for the entire week of February 24, 1997 and expected to engage 100 persons in this activity; and

(7) A scout who was to take pictures for Universal City in the building on March 27, 1997.

Exs. 13a-g. respectively; ,*See also* Tr. at 138-140.

III. Robert Duffer and his denials o£plaintiffs appeal

Robert Duffer was Richard Gardner's predecessor to the job the latter was promoted, Director of Property Management Division. At the time that he was dealing with Sefick's application he was in charge of approximately 200 buildings. Tr. at 83, 86-97. One of his responsibilities was to handle appeals of denials for requests to use federal space under the Cooperative Use Act. Tr. at 83.

A. Duffer's actions in denying Sefick's appeal

In the context of deciding the appeal, Duffer was familiar with Sefick's sculpture. He described it as something that was derogatory toward Judge Duff. Tr. at 91-92. Duffer indicated that prior to the time he received Plaintiff's appeal, he met with Gardner to discuss that there may be an appeal. He also indicated that he reviewed Gardner's letter of denial when he was in the process of deciding the appeal Tr. at 85.

Duffer received plaintiff's letter appeal on approximately September 17, 1996. His letter response to that is identified as exhibit 6, and was written on September 19, 1996. Tr. at 100-101. So, he spent a total of a maximum of 2 days investigating and determining the merits of Sefick's appeal.

Duffer's letter affirming the denial by Gardner does not state any additional reasons. Exhibit 6. In his trial testimony, with regard to the construction, Duffer indicated that he was familiar with the glazing project going on at the time. According to Duffer, he was concerned with anything that "could increase the public traffic through the lobby, ..." Tr. at 88. Duffer acknowledged that the glazing work going on in the Dirksen Building was being done in phases and that one side of the building would be done at a time. To do that, part of the building would be cordoned off. He indicated however, that transporting materials and people would be moving around outside the cordoned area. Tr. at 104.

Notwithstanding the foregoing, in deciding Sefick's appeal, Duffer admitted that he did not have any conversations with any construction workers or foremen about the danger or safety of having an exhibit in the building. Tr. at 109-110. Further, he admitted that he did *nothing* to independently investigate whether or not there would be a problem in the context of construction and placing an exhibit in the lobby of the building. Tr. at 109-110.

The second reason affirming the denial was the possible interference with judicial proceedings. With regard to this, he merely indicated that the words on the tape seemed derogatory towards Judge Duff. In this regard, he testified

that it was "remotely" possible that a juror Could be affected by the tape and the transcript. Tr. at 89-91.

Duffer also testified to a security concern in connection with the denial. Tr. at 93-94. This was not in writing. Again, this was in the context o£being concerned with anything that might bring additional people into the building.

B. Duffer and the GSA's policy, practices, and procedures in connection with exhibits

Duffer has worked for the GSA for 17 years. He understands that the Cooperative Use Act is used to promote the public use of federal buildings. Duffer further acknowledged that the Cooperative Use Act has been used "for everything from A-Z." Importantly, Duffer also acknowledged that there is no ban on the "subject matter of sculptures of judges being put in a building." Tr. at 98.

In addition to the foregoing, Duffer admitted that the denial rationale of possible interference with judicial proceedings has never been used by him in the past. Tr. at 90. His sole elaboration on this was because he thought the sculpture was derogatory. There was a "remote" chance it might influence a juror. Tr. at 108.

The newly testified unwritten concern of security arose from the Oklahoma City bombing case. Tr. at 93. However, Duffer could not think of any examples in 15 years in which an appeal came to him and he denied it for security reasons. Tr. at 97. He also never recommended an alternative location

for security reasons[3]

As noted, Duffer was concerned that Sefick's exhibit would bring additional traffic through the building. The fact that other agencies were allowed to put exhibits into the building, did not cause him a problem. He indicated that this was because the Cooperative Use Act does not really apply to "tenants of the building." Tr. at 89. This was the sole rationale he could think of in deciding why it was okay for government agencies and not Sefick to put an exhibit in the building at the time construction was going on. Nevertheless, he was aware of no policy distinguishing the public use of buildings by tenants and other citizens under the Cooperative Use Act. Tr. at 107. Moreover, the statute itself docs not distinguish the two.

IV. John Zbylut and his denial of plaintiff's application

John Zbylut was Richard Gardner's predecessor as building manager. Zbylut began this position when Gardner was promoted in late September 1996. Like Gardner, Zbylut's duties included granting permits to people who wanted to display things in the federal buildings under his jurisdiction He also had two assistants who performed the same function. At the time that Zbylut started his new job, he reported to Gardner. Tr. at 111, 125-126.

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[3] Duffer offered the MetCalf Building as an alternative. He admitted that it had the least amount of foot traffic, and when asked if that was "a good way to hide Mr. Sefick's exhibit," he responded by saying that "was not the case but you could say that." Tr. at 97.

A. Zbylut's activities in connection with plaintiff's application.

When Zbylut began his position as building manager, he discussed the Sefick issues with Gardner. The latter indicated that Sefick would probably pursue the issue of displaying his sculpture in the lobby of the Dirksen Building. Significantly, Gardner indicated to Zbylut that the courts were not in favor of the display. Tr. at 125. Shedding further illumination on the issue, Gardner indicated to Zbylut that the courts did not favor the *display because it was an embarrassment to Judge Duff. Id.*

Zbylut received Sefick's application shortly after January 13, 1997. Tr. at 113. Zbylut Contended that he had no idea what message the sculpture was intended to convey. However, as indicated above, Zbylut admitted that he had been told by Gardner, that the court's were not in favor of the display; he further admitted he was told that the display might impeded judicial processes "because it was an embarrassment to Judge Duff." Tr. at 125-126.

In dealing with the application to display the sculpture., Zbylut consulted with legal counsel. Zbylut sent Sefick a letter denying this application, which was identified as Exhibit 11. In the letter, the reasons cited for the denial was the extensive construction activity in the lobby and the concern for security issues. Tr. at 115-115, exhibit 11. The letter nowhere contains any mention of a denial because o£a possibility of impeding "judicial proceedings." Exhibit 11, Tr. at 115. However, contrary to this, when asked about the reason for the denial he indicated at trial as follows:

> A. Well, by that time we had correspondence from the Chief Judge in our building, and some of our major tenants in the building, telling us that he did not want any displays to be put in the lobby of the building.
>
> I cited the possibility that it could be disruptive to judicial proceedings.

Tr. at 115.

Zbylut's testimony tried to elaborate on the construction issue. He testified that they were replacing lobby windows and frames in the lobby. In this regard, the space that was under construction at any one time was one-quarter of the lobby. Significantly, when asked on direct, Zbylut testified, however, that the construction workers were not using any space other than the one-quarter of the lobby they were working on. Tr. at 116.

As noted above, in his letter, Zbylut also denied the application because of security issues. Zbylut, however, is not an expert on this issue and he would rely on someone else when dealing with it. He noted that the Federal Protection Service, the agency that had the expertise, knew "what's required as far as security in our buildings." Tr. at 122. Zbylut's letter referred to a "security evaluation." Zbylut admitted however, that he did not know if that was in fact true; he was merely told that it was occurring. Tr. at 128-129. Finally, to further underscore the point that Zbylut really did not know the basis for the reasons for the denial of Sefick's application as stated in his letter, he indicated that he, in fact, did not write that letter, but that counsel wrote for him. Tr. at

128.

B. Zbylut and the GSA policies, practices, and procedures in connection with exhibits

Very similarly to Gardner, Zbylut was asked to explain the reason why construction and security issues were sufficient to keep Sefick's exhibit from being displayed, but not sufficient to deny most other applications. His explanations and the contradictions were remarkably similar to Gardner's.

Similarly to Gardner's tenure as building manager, during Zbylut's tenure, there were several displays, exhibits and activities that did take place in the lobby during the same time period that Sefick was applying to display the sculpture. As building manager, Zbylut, like Gardner, expected his assistants to consult with him regarding applications and permits, but he indicated they did not always do that. Tr. at 111. Thus, to explain the fact that an assistant approved a request from the FBI for a children's art exhibit, Zbylut indicated that he would not have approved such an exhibit. Tr. at 119.

Zbylut fit his testimony to whatever circumstance he was confronted with regardless, of lack of consistency in the rationale and activities undertaken. On page 117 of the transcript he was questioned about the reasons he approved a computer expo to last for three days on November 5-7, 1996. His only response for approving such an exhibit, which was expected to involve 300 people in the Dirksen Building lobby, was as follows:

> A. Sometimes these things are kind of like put together and then at the last minute they realize that they need to get our permission and the permit, you know, may have been generated at the last moment.

Tr. at 118. He also indicated that "basically, I guess I don't remember all of the details surrounding it." Id. At 118-119. When pressed by his own counsel for a reason, he indicated that the GSA was approving applications "if they were coming from a tenant in the building as opposed to someone other than a tenant in the building." Tr. at 119.

However, immediately thereafter, when asked about the reason for the approval by his assistant of the FBI sponsored children's art exhibit, he indicated (notwithstanding that the FBI *is* a tenant) that if that request had gone to him he would not have approved it. *Id*. It is unclear why he would have said that he would not have approved the FBI sponsored children's exhibit since that would have fit with the "policy" of approving tenant applications. However, the fact that the children's art exhibit covered much more space that Sefick's exhibit, it was also "art", lasted for one full week, and presumably would have just as big, if not bigger impact on construction and security concerns as Sefick's, probably impacted this testimony.

Zbylut also tried to trumpet the fact that two exhibits were denied during his tenure as the building manager. One exhibit was an African-American display. This exhibit, however, required the entire lobby and was to have lasted a month. By his own admission, this would have been "difficult" (if not impossible) since at least a quarter of the

lobby was being used for construction. Tr. at 136-139.

The second exhibit was from Roosevelt University. When pressed, it was revealed that this was not really an exhibit for the lobby, but rather, it was an exhibit which was requested to be placed in, among other places, the cafeteria of the Dirksen Building. Tr. at 133-135.

Finally, it is interesting to note that Zbylut was questioned about the six exhibits/activities, which had occurred during the time that Sefick was trying to place his sculpture in the lobby. None of these exhibits had problems, or caused problems despite the fact of the construction and security concerns. This would also have included the Lifesource registered nurse permit in which they were actually drawing blood in the lobby. Tr. at 138-141.

Supreme Court, U.S.
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No. 98-1570

In the Supreme Court of the United States

JOHN SEFICK, PETITIONER

v.

RICHARD GARDNER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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1488

QUESTION PRESENTED

Whether the court of appeals improperly departed from the record, or otherwise erred, in its application of uncontroverted legal standards to sustain the decision of the General Services Administration to deny petitioner a permit to exhibit a satiric sculpture of a federal district judge in the courthouse lobby.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 164 F.3d 370. The opinion of the district court (Pet. App. 9a-36a) is reported at 990 F. Supp. 587.

JURISDICTION

The judgment of the court of appeals was entered on December 28, 1998. The petition for a writ of certiorari was filed on March 29, 1999 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a retired federal probation officer who creates satirical sculptures of public figures. Pet.

App. 11a. In 1996, petitioner created a large plaster sculpture depicting the Honorable Brian Barnett Duff, a federal judge then in active service on the United States District Court for the Northern District of Illinois, wearing judicial robes and sitting astride a stylized white horse. *Id.* at 11a-12a. The work is about five feet wide, eight feet long, and eight feet tall. *Id.* at 12a. A narrative audio tape accompanying the sculpture, as originally conceived, identified the figure as Judge Duff and included a voice representing the judge complaining, for example, "I can't figure out why they're overturning all my rulings upstairs. Must be a lack of understanding. If they got their facts straight, they'd see it my way." *Id.* at 3a, 12a. A descriptive statement supplied by petitioner explains that the sculpture depicts Judge Duff "arriv[ing] at the Dirksen Federal Building atop a giant symbolic steed representing the United States Court System." *Id.* at 3a.

In August 1996, petitioner applied to the General Services Administration (GSA) for a permit to display his sculpture for two weeks in the lobby of the Dirksen Federal Courthouse in downtown Chicago. Pet. App. 2a, 12a. The Dirksen Courthouse houses, among other tenants, the primary chambers and offices of the United States Court of Appeals for the Seventh Circuit and the United States District Court for the Northern District of Illinois. *Id.* at 2a.[1] Respondent Gardner, at that time the GSA building manager with responsibility for reviewing applications to use courthouse space, denied the application, explaining in a letter to petitioner (1) that the courthouse lobby was undergoing an

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[1] We are informed that other courthouse tenants include the Bankruptcy Court, the United States Attorney, the Federal Bureau of Investigation, and the United States Marshal.

extensive renovation, and GSA did not want to cause unwarranted obstructions for construction workers and lobby pedestrians, and (2) that GSA was concerned that the exhibit "[might] be construed as an attempt to influence judicial proceedings" in either the district court or the court of appeals. *Id.* at 12a-13a; see 40 U.S.C. 490(a)(17); 41 C.F.R. 101-20.403(a)(3) and (4).

Petitioner appealed the denial of his application to respondent Duffer, then the appropriate GSA Regional Officer. Pet. App. 14a-15a; 41 C.F.R. 101-20.404(a). The Regional Officer affirmed the denial of space in the Dirksen Courthouse, but he offered to issue a permit for display of the sculpture in the nearby Metcalf building, a federal office building that does not contain courts. Pet. App. 15a. In response, and after Judge Duff retired from active service, petitioner offered to alter his proposed installation by omitting any mention of Judge Duff by name and replacing the proposed tape recording with a recording of the song "Don't Cry for Me Argentina," from the musical *Evita*. *Id.* at 4a, 16a-17a. GSA again offered petitioner display space in the Metcalf building, and the sculpture was in fact displayed there for two weeks. *Id.* at 4a, 17a.

In January 1997, petitioner submitted a new application to exhibit his sculpture in the Dirksen Courthouse lobby. Pet. App. 18a. GSA again granted a permit, but again only for the Metcalf building. *Ibid.* The letter informing petitioner of that decision, signed by respondent Zbylut (who had succeeded respondent Gardner), again cited the construction work being done in the lobby of the Dirksen building, and attendant safety concerns. *Ibid.* The letter added that GSA had undertaken a "security evaluation" of the Dirksen building, as a result of threats made against some of the building's tenants, and that respondent Zbylut was "not approv-

ing any Applications for use of space in the building until these concerns are fully addressed." *Id.* at 18a-19a.

2. Petitioner sued respondents in federal district court, alleging that the refusal to issue a permit for display of his sculpture in the Dirksen building discriminated against him on the basis of his viewpoint, in violation of the First Amendment.[2] Pet. App. 4a. The district court first held that the Dirksen Courthouse lobby is not a "public forum" for First Amendment purposes. *Id.* at 21a-22a; see generally, *e.g.*, *Arkansas Educ. Television Comm'n* v. *Forbes*, 118 S. Ct. 1633, 1641 (1998) (discussing forum analysis). Petitioner does not challenge that determination. Pet. 3, 12. The trial (to the bench) accordingly focused on whether GSA's decisions denying petitioner display space in the Dirksen building were "reasonable" and "viewpoint neutral." Pet. App. 10a, 22a. The court required the government to bear the burden of proof on those issues. *Id.* at 23a-25a.

After hearing the evidence, the district court found that respondents had denied petitioner access to the Dirksen Courthouse because of the extensive construction work being done in the lobby; because of general concerns about security, particularly in light of the April 1995 bombing of a federal office building in Oklahoma City; and because of concern that display of petitioner's sculpture in the courthouse lobby might influence or impede judicial proceedings. Pet. App. 12a-20a; see *id.* at 26a. The court specifically found that "no

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[2] Although petitioner initially asserted claims against respondents in their individual, as well as official, capacities, he later dropped the individual claims, and he presently seeks only injunctive relief. See Pet. App. 11a.

[respondent] rejected [petitioner's] sculpture [for display in the courthouse lobby] because he disapproved of its viewpoint, or because any other person who disagreed with the viewpoint pressured the [respondent] to reject the sculpture." *Id.* at 21a.

The district court rejected petitioner's argument that the explanations offered by respondents were merely "pretexts for viewpoint discrimination." Pet. App. 26a. The court acknowledged that various other activities were allowed in the courthouse lobby despite the construction activity, but it concluded that respondents "had legitimate and reasonable explanations for allowing those activities but not [petitioner's] sculpture." *Id.* at 27a. In contrast to tenants who sponsored activities that were generally brief in duration and could be easily rescheduled or relocated if the need arose, petitioner, who had no other relationship with GSA or the building, "proposed a 400-pound sculpture to be displayed for two weeks." *Ibid.* Moreover, "substantial unrebutted testimony indicated that at all relevant times, security was a serious concern in all federal buildings and especially those housing court facilities," and "the general debate about banning lobby displays for security reasons had nothing to do with the viewpoint or subject of any display." *Id.* at 28a. The court accepted respondents' explanation that any "perceived inconsistencies" between their denial of petitioner's permit applications and their approval of permits for certain other activities "were satisfactorily explained as departures from the chain of command * * *, or based on the particular nature of the activity approved." *Id.* at 27a; see *id.* at 21a, 28a.

With respect to petitioner's argument that his sculpture could not plausibly be viewed as attempting to influence pending proceedings, and that respondents'

reliance on that ground must therefore be pretextual, the court pointed out that "largely semantic [arguments] regarding whether [respondents'] decision fits under the precise terms of the [applicable GSA] regulation" were inapposite in the context of petitioner's First Amendment claim. Pet. App. 28a-29a. Rather, the court observed, "regardless of how well [petitioner's] sculpture fits under the regulatory concept of potential 'influence,' it fits sufficiently under a concept more relevant for present purposes": *i.e.*, "the need to maintain the dignity and purpose" of a courthouse building, in which "decorum must be maintained" in order "[t]o dispense fair and effective justice." *Id.* at 29a. "[C]ases must be heard," the court explained, "in a dignified environment that impresses upon the participants the seriousness and importance of the proceedings, and the need to follow the rules of deliberation, decision, and personal behavior that the trial judge supplies." *Ibid.* Concluding that respondents' concern "was essentially * * * over courthouse decorum," the court held that respondent Duffer "reasonably and genuinely saw [petitioner's] sculpture as capable of negatively influencing jury deliberations" because "[a] juror who, in the courthouse, encounters an arguably cartoonish sculpture of a sitting judge commenting that all of his rulings are being overturned might conclude that the courthouse is something less than the sober and weighty place it must be, or that Judge Duff and his colleagues do not warrant the respect that their positions—not their personal feelings—require." *Id.* at 30a.

The district court recognized, in closing, that respondents "could have said more to explain their thought processes." Pet. App. 33a. The court observed, however, that respondents' "burden is simply to demonstrate that they acted reasonably and not to suppress a

viewpoint." *Ibid.* Concluding that respondents had carried that burden, the court held that their denial of petitioner's permit requests "did not violate the First Amendment." *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-8a. The court first held that petitioner's suit for injunctive relief was not rendered moot by GSA's determination, after the events in issue, that for security and aesthetic reasons it would not permit displays of any type in the courthouse lobby. *Id.* at 4a-5a. The court then observed that petitioner could prevail on appeal "only by establishing that the district judge, as trier of fact, was clearly erroneous in concluding that the GSA did not discriminate against [petitioner's] sculpture because it was critical of the judiciary." *Id.* at 5a. The court noted that it would be difficult for petitioner to make that showing, particularly in light of "the extensive construction in the lobby at the time of [petitioner's] applications, and the security concerns * * * in the wake of the Oklahoma City bombing."[3] *Ibid.* It reasoned further that GSA's 1995 grant of a permit to petitioner to display another satiric sculpture of Judge Duff suggested that GSA was not "set against sculpture critical of federal judges." *Ibid.*

The court went on to emphasize that the courthouse lobby was a "nonpublic forum," and that in that context, even if petitioner could show that GSA had taken account of the work's "satirical perspective" in denying him a permit to use the lobby, respondents would not have violated the First Amendment by "insisting that

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[3] The court noted that "[a]ll four walls of the lobby in the Dirksen Courthouse are glass, so anything unusual inside will attract attention and thus traffic, which makes life more difficult for those charged with maintaining security." Pet. App. 5a.

exhibits in a federal courthouse be dignified." Pet. App. 5a-6a. To the contrary, the court explained:

> Courts seek to induce in the jurors, witnesses, and litigants who pass through the lobby on the way to the courtrooms a serious cast of mind. An implication in the lobby that judges do not take their oaths seriously, deal honestly with the facts, or respect the allocation of authority within the judiciary could undermine the seriousness with which other participants take their own oaths and tasks. * * * Newspapers and the streets outside are open to scathing criticism of what happens within the courthouse. * * * But the halls of justice may be kept hushed.

Id. at 6a-7a. Citing this Court's observation that "[t]he First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose," *id.* at 8a (quoting *Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 811 (1985)), the court concluded that "[n]othing in the [F]irst [A]mendment prevents the government from allowing sedate and decorous exhibits * * * while excluding the comic, the caustic, and the acerbic" (*id.* at 6a). Indeed, "[a] preference for the somber over the sardonic within a courthouse is not viewpoint or even subject-matter discrimination. It is a standard time, place, and manner limitation. A courthouse is not the place for this manner of expression." *Id.* at 7a.

ARGUMENT

Petitioner concedes that the lobby of the Dirksen Courthouse is not a "public forum" for purposes of First Amendment analysis. See Pet. 3, 12. He also agrees with the legal standard articulated by the courts below,

under which restrictions on access to the lobby are permissible so long as they are "reasonable in light of the purpose served by the forum and are viewpoint neutral." Pet. 12 (quoting *Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985)); see Pet. App. 6a, 22a-23a. Petitioner argues only that the court of appeals improperly relied on factual findings not made by the district court or supported by the record (Pet. 10-11, 13), and that it failed to apply the legal standard properly to the facts of his case (Pet. 13). Those fact-bound contentions do not warrant review by this Court.

In any event, there is no merit to petitioner's arguments. After trial, the district court concluded that GSA was "reasonably and genuinely" concerned that display, in the courthouse lobby, of an "arguably cartoonish sculpture of a sitting judge commenting that all of his rulings are being overturned" could have a negative effect on passing jurors or litigants, who "might conclude that the courthouse is something less than the sober and weighty place it must be, or that [judges] do not warrant the respect that their positions—not their personal feelings—require." Pet. App. 30a. The court properly characterized that concern as "essentially concern over courthouse decorum," and it emphasized that the "vital interest in courthouse decorum is most emphatically not a mere interest in shielding judges from criticism and personal discomfort," but rather an interest in "ensur[ing] that the persons whose property and liberty are at stake in legal proceedings have their rights adjudicated fully, fairly, and according to the rule of law." *Id.* at 29a-30a.

In the section of its opinion with which petitioner takes issue (Pet. 10-11), the court of appeals simply endorsed those findings and conclusions of the district

court. See Pet. App. 6a-7a (The First Amendment does not preclude courthouse administrators from permitting lobby displays that are "somber" and "dignified" while excluding those that are "comic," "caustic," "acerbic" or "sardonic."). Petitioner's suggestion to the contrary notwithstanding, the court's substitution of the terms "dignified" and "comic" for the district court's "decorum" and "cartoonish" does not amount to improper appellate fact-finding. To the extent that the court of appeals' analysis depended on findings of fact, those findings were made by the district court. To the extent the court of appeals was discussing legal principles or drawing legal conclusions (as in its discussion of the permissibility, under the First Amendment, of taking the need for decorum into account in regulating the use of a courthouse lobby), the court was, of course, entitled to address the relevant issues de novo. See 40 U.S.C. 490(a)(17) (authorizing GSA to make space in public buildings available for activities "that will not disrupt the operation of the building"); 41 C.F.R. 101-20.403(a)(3) and (4) (GSA will not approve a use that "disrupts official Government business, interferes with approved uses of the property by tenants or by the public, or * * * is intended to influence or impede any pending judicial proceeding.").

Petitioner is, moreover, wrong in asserting (Pet. 11) that the court of appeals addressed contentions not raised by the parties, to which petitioner had no opportunity to respond. Respondents specifically argued in their appellate brief, for example, that "[t]he need to preserve decorum and integrity in the forum at issue here is significant" (Gov't C.A. Br. 40), and petitioner replied specifically to that point by arguing that the record did not support the district court's ruling on that score (Pet. C.A. Reply Br. 6). The court of appeals

resolved that dispute against petitioner, and the matter does not merit further review.

Finally, even if there were some flaw in the court of appeals' alternative discussion of the constitutionality of preferring "sedate and decorous exhibits" (Pet. App. 6a) in courthouse lobbies, there would be no reason for review in this case. As the court noted at the outset of its opinion (*id.* at 5a), petitioner could prevail, even on his own First Amendment theory, "only by establishing that the district judge, as trier of fact, was clearly erroneous in concluding that the GSA did not discriminate against his sculpture because it was critical of the judiciary." See also *id.* at 21a (district court findings) ("[N]o [respondent] rejected [petitioner's] sculpture because he disapproved of its viewpoint, or because any other person who disagreed with the viewpoint pressured the [respondent] to reject the sculpture."), 23a-25a (requring the government to bear the burden of proof on viewpoint-neutrality). Although petitioner rehearses in this Court his reasons for disagreeing with that finding (see Pet. 6-7, 13), those arguments have been twice rejected, and petitioner cannot meet the heavy burden of establishing that the district court's dispositive finding was "clearly erroneous."[4]

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[4] Petitioner cites (Pet. 10) *Bose Corp.* v. *Consumers Union of the United States, Inc.*, 466 U.S. 485 (1984), which held (*id.* at 514) that in defamation cases appellate courts must exercise independent judgment in reviewing a trier of fact's conclusion that a false statement was made with "actual malice." It is not clear that the reasons for that decision (see *id.* at 501-511) would lead to a similar conclusion about the factual questions involved here (*i.e.*, whether respondents' decision to deny petitioner a permit was reasonable and viewpoint-neutral); but if *Bose* does apply, then petitioner's argument that the court of appeals stepped outside proper bounds

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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in reviewing the district court's judgment is correspondingly weakened even further.